TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 274.

WILLIAM RANDALL AND GEORGE S. AKERS, PLAINTIFFS IN ERROR,

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

FILED FEBRUARY 20, 1922.

(28,722)

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1 STATE OF INDIANA:

In the Supreme Court.

Be it remembered That heretofore towit: On the 11th day of April, 1919, the same being the 119th Judicial day of the November Term 1918 of said Supreme Court, Filliam Randall, et al. by their attorneys, Parks & Parks and Chas. M. Snyder filed in the office of the Clerk of said Supreme Court of said State of Indiana, a transcript of the record and proceedings had in the Tippecanoe Superior Court of said State of Indiana, in a cause wherein William Randall et al. were appellants, and the Board of Commissioners of Tippecanoe County, Indiana, was appellee, together with an assignment of errors by appellant and its appeal bond, which said transcript was filed as a term time appeal, and *are* in the words and figures following, to wit:

STATE OF INDIANA:

In the Supreme Court.

No. 23567.

WILLIAM RANDALL, GEORGE S. AKERS, Appellants,

vs.

BOARD OF COMMISSIONERS, TIPPECANOE COUNTY, IND., Appellee.

Transcript on Appeal.

Parks and Parks,
Chas. M. Snyder,
Attorneys for Appellants.

Filed April 11, 1919.

PATRICK J. LYNCH,
Clerk.

2 STATE OF INDIANA,
Tippecanoe County, ss:

Pleas held before the Honorable Henry H. Vinton, Judge of the Tippecanoe Superior Court of Tippecanoe County in and for said County and State, and at the January Term thereof in the year of our Lord, 1919, as follows, to-wit:

Filing of Original Complaint.

Filed Apr. 11, 1919. Patrick J. Lynch, Clerk.

554.

WILLIAM RANDALL, GEORGE S. AKERS

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

Damages.

Be it remembered that heretofore, to-wit: on the 30th day of September, 1914, the above named plaintiffs, by Parks and Parks, their attorneys, filed in the Office of The Clerk of this Court their complaint, with precipe endorsed thereon, which complaint with precipe endorsed thereon reads in the words and figures following, to-wit (Insert) and thereupon summons was issued upon said complaint in accordance with the precipe for the same and said cause was placed upon the Bench Docket as an action therein pending.

Be it further remembered, that heretofore, to-wit, at the September Term of said court begun and held at the Court house, in the City of La Fayette, in said County and State, on Monday, September 28, 1914, said day being the Fourth Monday in said month and being the time fixed by law for holding a term of said Court, before the Honorable Henry H. Vinton, Judge of said Court, the following proceedings were had in this cause and entered *on* record on the Order Books of said court on the days and dates indicated as follows, to-wit:

3 *Appearance for Defendant.*

Wednesday, October 7, 1914, 9th Day.

554.

WILLIAM RANDALL and GEORGE S. AKERS

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

Damages.

Comes now Harry M. Snideman and enters his appearance as counsel for the defendants herein, and day is given.

Be it further remembered, that afterwards, to-wit: at the January Term of said court begun and held at the Court House in the City of Lafayette, in said County and State, on Monday, January

4, 1915, said day being the First Monday in said Month and being the time fixed by law for holding a Term of said Court, before the Honorable Henry H. Vinton, Judge of said Court, the following proceedings were had in this cause and entered of record on the Order Books of said Court on the days and dates indicated as follows, to-wit:

Set for Trial Before Jury.

Wednesday, January 6, 1915, 3rd Day.

554.

WILLIAM RANDALL et al.

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

Damages.

Come the parties, and the Court, on Docket Call, sets this cause down for trial, by Jury, for Monday, March 15, 1915, and day is given.

Wednesday, February 3, 1915, 27th Day.

554.

WILLIAM RANDALL et al.

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

Damages.

4 Comes now Harry M. Snideman and withdraws his appearance as counsel for the defendants, and comes now Allen Boulds and enters his appearance as counsel for said defendants, and day is given.

Be it remembered that afterwards, to-wit at the March Term of said Court begun and held at the Court House, in the City of La Fayette, in said County and State, on Monday, March 8, 1915, said day being the Second Monday in said Month and being the time fixed by law for holding a Term of said Court, before the Honorable Henry H. Vinton, Judge of said Court, the following proceedings were had in this cause and entered of record on the Order Books of said Court on the days and dates indicated as follows, to-wit:

Motion for Change of Venue. Change of Venue.

Thursday, March 11, 1915, 4th Day.

554.

WILLIAM RANDALL and GEORGE S. AKERS,

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

Damages.

Come now the plaintiffs, by Parks & Parks, their attorneys, and file motion and affidavit for a change of venue of this cause from this to another county, said motion and affidavit reading as follows, to-wit: (Insert). And the Court after examining said motion and affidavit, and being fully advised and satisfied in the premises, does now sustain the same, and orders that this cause be and the same is hereby now venued to Montgomery County, Indiana, and to the Montgomery Circuit Court, and said plaintiffs are allowed ten (10) days, from this date in which to perfect said change.

5 Be it further remembered, that afterwards, to-wit: at the September Term of said Court begun and held at the Court House in the City of La Fayette, in said County and State on Monday, September 23, 1918, said day being the Fourth Monday in said Month and being the time fixed by law for holding a Term of said Court before the Honorable Henry H. Vinton, Judge of said Court, the following proceedings were had in this cause and entered of record on the Order Books of said Court on the days and dates indicated as follows, to-wit:

Cause Remanded.

Friday, December 20th, 1918, 77th Day.

554.

WILLIAM RANDALL et al.

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

Damages.

Come now the parties by their attorneys, and by agreement of all the parties, this cause is remanded to Tippecanoe Superior Court and is now redocketed as an action pending therein and set for trial by Court for Monday, December 23, 1918, and day is given.

Answer Filed.

Monday, December 23, 1918, 79th Day.

554.

WILLIAM RANDALL et al.

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

Damages.

Comes the defendant, by Allen Boulds and Clyde H. Jones, and file- answer in denial, said answer reading as follows, to-wit (Insert) and by agreement of parties the assignment for trial is set aside and set for trial by Court on January 3, 1919, and day is given.

6 *Submission to Court.*

Friday, January 3rd, 1919, 89th Day.

554.

WILLIAM RANDALL et al.

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

Damages.

Come the parties, in person, and by their attorneys the plaintiffs request special findings of facts and conclusions of law, and this cause being at issue is now submitted to the Court for hearing and trial without the intervention of a Jury, and the evidence being partly heard, this cause is continued until tomorrow morning at nine o'clock, and day is given.

Saturday, January 4th, 1919, 90th Day.

554.

WILLIAM RANDALL et al.

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

Damages.

Come the parties, in person, and by their attorneys as heretofore appearing, and the evidence being partly heard this cause is continued until Monday morning at nine o'clock, and day is given.

Be it further remembered that afterwards, to-wit: at the January Term of said Court begun and held at the Court House in the City of La Fayette, in said County and State on Monday, January 6, 1919, said day being the First Monday in said Month and being the time fixed by law for holding a Term of said court before the Honorable Henry H. Vinton, Judge of said Court, the following proceedings were had in this cause and entered of record on the Order Books of said Court on the days and dates indicated as follows, to-wit:

7 *Submission Set Aside. Leave to File Amended Complaint.*

Monday, January 6th, 1919, 1st Day.

554.

WILLIAM RANDALL et al.

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

Damages.

Come the parties, in person, and by their attorneys as heretofore appearing, and by agreement the submission of this cause is hereby set aside, and by leave of Court first granted, the plaintiffs file an amended complaint in two paragraphs, reading as follows, to-wit:

"STATE OF INDIANA,
Tippecanoe County, ss:

In Superior Court, to January Term, 1919.

WILLIAM RANDALL and GEORGE S. AKERS, Plaintiffs,

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, Defendant.

Amended Complaint.

1st Par. Amended Complaint.

By leave of Court first had and obtained the Plaintiffs present and file this their amended complaint.

The plaintiffs complain of the defendants, and say: That they are the owners, and seized in fee of Lots fifty two (52), Fifty three (53) and fifty four (54) in William Z. Martin's Addition to the Town of West La Fayette, in said county; and also that portion of Lot eighteen (18) in Chauncey's Plat of Bottom Lands adjoining the Town of Chauncey, (now West La Fayette) lying and being north of the Lake Erie & Western Railway's right of way west of the low water mark of the Wabash River, and east of the center of the

levee extending in a southwesterly direction from the north west
corner of Lot number fifty two (52) in William Z. Martin's
8 Addition to the right of way of the Lake Erie & Western
Railroad. That plaintiffs have owned said property since the 28th day of September, 1911, and up to and including the time of the filing of this complaint.

Plaintiffs further show that Main Street in the City of La Fayette at its west end terminates at the Wabash River; that on the 9th day of September 1913, a bridge extended across the Wabash River from the west end of Main Street in the City of La Fayette to the west bank of said river; that said bridge was constructed more than twenty years prior to the 9th day of September 1913, and was constructed by and under the control of the defendant; that at the west end of said Main Street Bridge was constructed a large stone abutment, that from said abutment a levee and approach to said bridge was constructed extending westerly for more than twelve hundred feet; that the said levee and approach constituted a public highway which had been maintained and used as such for more than twenty years prior to said 9th day of September 1913, and said levee and approach, together with said bridge known as Main Street Bridge, constituted and furnished the principal thoroughfare, highway and street connecting the City of La Fayette with the Town of West La Fayette.

That West La Fayette is an incorporated town, and has been for more than thirty years prior to the filing of this complaint, and said levee and approach to said bridge was one of the public streets in said town, and had been such for more than twenty years prior to the 9th day of September, 1913.

That said approach to said bridge and levee, at the west end of said bridge was on the 9th day of September, 1913, thirty seven (37)
feet above the low water mark of the Wabash River; that
9 said levee was constructed upon land that is usually known
as "bottom land," the surface of which was about twelve or fifteen feet above low water. That at the west end of said bridge the levee and approach was twenty five (25) feet above the top of the bank of the river. That the west abutment of said bridge retained the east end of said levee and approach, and protected the same from the waters of said river.

That on said 9th day of September, 1913, the plaintiff's lands, said lots fifty two (52), fifty three (53) and fifty four (54) adjoined and abutted upon said levee and abutment, on the south side thereof; and the remainder of plaintiffs' lands lie south of said lots and extend to the right of way of said railroad company. At the southern boundary of plaintiffs' lands said railroad company had constructed a bridge with an approach and levee extending westerly across said "bottom lands" of said river, and the same had so existed for more than twenty years prior to the 9th day of September, 1913, that said river at said La Fayette flows from north to South. That plaintiffs and their grantors, immediate and remote, had prior to said 9th day of September, 1913, been in possession and owners of the

fee of plaintiffs' said lands so as aforesaid abutting on said highway and levee and bridge approach for more than twenty years prior to said 9th day of September, 1913, and had constructed an embankment or levee running north and south from the north west corner of said lot fifty two (52) to the right of way of said railroad company extending southerly from said levee and approach to said Main Street Bridge and attached and adapted the same thereto; that plaintiffs and their grantors had made fills of earth on the south side of said levee, approach and abutment of said Main Street
10 Bridge on said lots fifty two (52), fifty three (53) and fifty four (54) and had constructed thereon valuable buildings and improvements extending across the north end of lots fifty two fifty three and part of lot fifty fifty four, that said improvements and buildings had been so constructed that the same were adapted to the grade and conditions of said highway, and ingress and egress to plaintiffs' property was from said highway to said property, and was unobstructed.

That the first floor of said buildings were constructed at the grade of said highway, and said buildings abutted upon the south side of the sidewalk on said street and highway.

That for more than twenty years prior to the 9th day of September, 1913, the plaintiffs and their immediate grantors had a special interest in said highway and were the owners of the fee of the lands occupied by said levee and highway adjacent to said plaintiffs' land, subject only to the public use thereof as a highway. That plaintiffs and their grantors, immediate and remote, for more than twenty years prior to the 9th day of September, 1913, owned and had a special interest and easement in said levee and bridge abutment at the west end of said Main Street Bridge adjoining plaintiffs' property, and the maintenance of said bridge abutment and levee was necessary to the use and enjoyment of plaintiffs' property and the preservation of plaintiffs' soil, and in the protection of plaintiffs' property against the waters of the Wabash River.

And the plaintiffs aver that the portion of said highway and levee upon which plaintiffs' lots fifty two (52) fifty three, and fifty four abutted had never been overflowed by the waters of the
11 Wabash River since the time the same was constructed; that in the month of March, 1913, a most extraordinary flood and freshet occurred in the Wabash River, and the waters overflowed and were higher than has been known in a period of "time to which the memory of man runneth not to the contrary" that notwithstanding said extraordinary flood and freshet said levee and approach that was adjacent to and upon which plaintiffs said lots fifty two, fifty three and fifty four abutted, was not overflowed, and the plaintiffs' buildings and improvements thereon and the soil of said lots were fully and completely protected from injuries by the waters of said river, and that said levee and approach and abutment had furnished adequate and complete protection to said lots fifty two, fifty three and fifty four, against the waters of the Wabash River for a period of more than twenty years prior to the 9th day of September, 1913,

and were adequate and sufficient to furnish said lands all necessary future protection from the waters of said river.

The plaintiffs further aver that at the time of said extraordinary flood in the month of March, 1913, the high waters of said river injured one of the piers of said Main Street Bridge and the same settled and injured said bridge; that thereafter the defendant acting within the scope of its authority, took such necessary steps and action to the end that on the 9th day of September, 1913, said defendant let and entered into a contract for the construction of a new bridge across said Wabash River from the west end of Main Street in said City of La Fayette according to certain plans and specifications. That said plans and specifications provide, among other things, for the
12 construction of a deck, concrete, and steel girder bridge of six spans, each one hundred twenty-five (125) feet along and resting upon a concrete abutment at each end, and five concrete piers under the ends of the respective spans; that by said plans and specifications the west end of said new bridge was located one hundred seventy (170) feet farther west than the west end of the old bridge; that the first pier from the west end of said new bridge was located immediately in front of said plaintiffs' lots fifty-two and fifty-three, and the plaintiffs' buildings thereon constructed; that said plans and specifications for said new bridge provide that the floor of said new bridge to be nine feet higher than the grade of the said levee in front of plaintiffs' said buildings; that the floor of said new bridge to be fifty-six feet in width; that the aforesaid pier of said bridge in front of plaintiffs' property is sixty-seven (67) feet extending north and south; that the center line of said new bridge in front of plaintiffs' said property is the center line of said levee; that said levee at plaintiffs' land was eighty (80) feet in width; that said new bridge according to said plans and specifications has a roadway of forty (40) feet in width, and sidewalks extending from the curb at each side of said roadway eight (8) feet in width; that on each outer side of said bridge is constructed, according to said plans and specifications a massive rail made of a base, turned ballisters and cap rail of stone, with massive posts at the end of each span over said piers; that said plans and specifications provide, and the top of said hand rail is thirteen (13) feet above the said grade of said levee as the same was in front of plaintiffs' buildings; that said plans and specifications provided that the pier in front of plaintiffs'
13 property should be constructed of concrete resting upon piling; that the bottom of said concrete in said pier should be placed at a depth of twelve (12) feet below low water mark; that said pier at its base was of a thickness or extended east and west fifteen (15) feet, and north and south seventy-five (75) feet; that said plans and specifications provided that the contractor should remove said old abutment at the west end of said old bridge.

That the defendant, acting within the scope of its authority, on the 20th day of December, 1913, let and entered into a further contract for the improvement of said levee and highway from the west end of the new bridge to the west end of said levee to furnish a suit-

able approach, levee and highway to the west end of the new bridge according to certain plans and specifications; that it is provided in said last mentioned contract, among other things in said plans and specifications, for the removal of said levee and approach to said old bridge from the west abutment of the new bridge to the west abutment of the old bridge, extending along and across and in front of said plaintiffs' lots fifty-two, fifty-three and fifty-four.

That according to the provisions of the plans and specifications for said new bridge and the improvement of said levee for an approach and levee to said new bridge, the defendant has caused the old abutment at the west end of the old bridge and the levee extending entirely across the north side of plaintiffs' land to be removed and taken away, and the entire north side of plaintiffs' land and property has no protection against the waters of said river.

And plaintiffs aver that soon after the letting of said contract by the defendant for the construction of said new bridge the said
14 contractor entered upon the execution of his said work and commenced excavating said levee in front of plaintiffs' said property at the location of the first pier east of the west end of said new bridge; that said specifications required such excavation to go fifty (50) feet below the surface of said highway in front of plaintiffs' property and immediately adjoining said plaintiffs' buildings; that said contract and specifications made no provision whatever for the protection of the soil of the plaintiffs' land from caving or no other provisions for the protection of plaintiffs' property, or any provisions whatever for any lateral support to plaintiffs' property, or the soil thereof.

That under said plans and specifications it was impossible to construct said pier and make the necessary excavation therefor without causing the fall of plaintiffs' buildings and the earth supporting them into said excavation.

That said defendant, on the 20th day of December, 1913, served upon the plaintiffs the following notice, addressed to the plaintiffs severally, to-wit:

"You are hereby notified that the contractor will begin excavation December 22, 1913, for a pier for the new Main Street Bridge opposite property in which you are interested at the West end of the old bridge across the Wabash River at La Fayette, Indiana, this property being commonly known as 'Red Wharf.'

The excavation of this pier will necessarily have to go below the foundation of your building, this notice is given you in order that you may take steps to protect your property as far as possible.
15 Witness the seal of the Board of Commissioners of Tippecanoe County, State of Indiana.

GEO. W. BAXTER,
Auditor Tippecanoe County, Indiana.

Dated this 20th day of December, 1913."

That plaintiffs' buildings on said property were constructed as aforesaid of concrete and cement block and could not be secured by

plaintiffs from falling into said excavation, nor could plaintiffs protect their soil from falling into said excavation; that unless removed, the destruction of said buildings by the prosecution of said work in the construction of said pier would be inevitable; that thereupon in order to save as much of the value of said buildings as possible said plaintiffs offered the same for sale, and after using all due effort and diligence to obtain the highest price therefor plaintiffs sold said buildings for the sum of Twenty five dollars ($25.00), that sum being the highest and best bid they could obtain for the same; and said buildings above their concrete foundation were removed; that thereafterwards large quantities of plaintiffs' soil on his said lot caved into said excavation, and said contractor, to protect his new work and the lives of his employees broke up, destroyed and removed a portion of said concrete foundation; that by the terms of said contract for the construction of said new bridge, and by the plans and specifications therefor the defendant assumed all damages to private property occasioned by the constructon of said work; that the work of the construction of said new bridge and the improvements of the highway and approach at its west end has been completed according to said contracts, plans and specifications; that the excavation for said pier in front of plaintiffs' property has
16 been completed, and said pier has been erected, and said levee and highway in front of plaintiffs' property, and on the north side thereof, has been removed and destroyed; that the waters of the Wabash River have and will have free access about said pier and under said new bridge, and because of said excavation and the removal of said levee, and the removal of said abutment, the waters of the Wabash River are turned and flow against and over and upon the surface of plaintiffs' property and carry thereon vast quantities of water, sand, earth and debris, and wash away plaintiffs' soil; that by said excavations required in the construction of said work for and on behalf of the defendant by said contractors the west bank of the Wabash River has been extended and excavated westerly, and the waters of said river turned in, upon, and over the plaintiffs' said lands; that by said work completed as in accord with said contracts, plans and specifications the Wabash River is widened at said point; that it was the design of the defendant in the construction of said new work to widen and provide for a larger and greater waterway for the Wabash River beneath its said new bridge; and that said bridge abutment was removed and said levee was removed that the water might have free passage under such new bridge.

Plaintiffs aver that by the construction of said new bridge and levee and approach at its west end aforesaid, the highway existing for more than twenty years in front of and adjoining the plaintiffs' property and upon which it abutted has been destroyed and removed, and its soil excavated and carried away; that the plaintiffs owned the right and easement of all the support and protection aginst high waters of the Wabash River which plaintiffs' property had
17 received, and of which plaintiffs and their grantors, immediate and remote, had been in possession for more than twenty years prior to said 9th day of September, 1913.

That plaintiffs' easement and property rights in said highway, levee and abutment has been destroyed; that plaintiffs' land by the construction of said work by said defendant is overflowed and rendered of no value; that all ingress and egress of plaintiffs' to said highway has been destroyed, and no ingress or egress can reasonably be provided for said plaintiffs' property to said highway; that plaintiffs' property is within the banks of the Wabash River, caused by the construction by the defendant of said works.

That plaintiffs' property immediately prior to the 9th day of September, 1913, was of the value of Twelve Thousand Dollars ($12,000.00); that defendant acting under its authority and power has taken the same; that defendant has made to plaintiffs no payment or compensation therefor; that no proceedings or appropriation were begun or made by said defendant for the taking of said property; that as aforesaid said highway and levee at the west end of said old bridge in front of and along the north side of plaintiffs' property was a street in the incorporated Town of West La Fayette; that no proceedings have been taken by said Town for the change of grade of said street, but that said defendant, acting under its statutory power and authority has taken plaintiffs' said property and easements in the construction of said bridge and its approach without making any compensation therefor, thereby has injured and damaged plaintiffs' property to the extent of its entire value, to-wit: in the sum of Twelve Thousand Dollars ($12,000.00), together
18 with interest thereon from said 9th day of September, 1913.

Wherefore plaintiffs pray for judgment against the defendant in the sum of Thirteen Thousand Dollars ($13,000.00) and for all other and proper relief.

PARKS & PARKS,
CHAS. M. SNYDER,
Attorneys for Plaintiffs.

For a Second Paragraph of amended complaint the plaintiffs complain of the defendant, and say:

Second Paragraph Amended Complaint.

That they are the owners and seized in fee of lots fifty two (52) fifty three (53) and fifty four (54) in William Z. Martin's Addition to the Town of West La Fayette, in said county of Tippecanoe, and also that portion of Lot eighteen (18) in Chauncey's Plat of Bottom lands adjoining the Town of Chauncey (Now West La Fayette) lying and being north of the Lake Erie & Western Railway's right of way west of the low water mark of the Wabash River, and east of the center of the levee extending in a southwesterly direction from the northwest corner of Lot number fifty two (52) in William Z Martin's Addition to the right of way of the Lake Erie & Western Railroad. That plaintiffs have owned said property since the 28th day of September, 1911, and up to and including the time of the filing of this complaint.

Plaintiffs further say that on December 30, 1863, "The Main Street Bridge Company" was duly organized under the laws of the State of Indiana for the purpose as set out in its articles of association "of constructing and owning a bridge across the Wabash River in Tippecanoe County, Indiana, and of constructing and owning an embankment or causeway which shall be most direct across
19 the Bottom Land on the west side of Wabash River and connect said bridge with the said road leading westward from La Fayette."

That said Bridge company brought suit in the Common Pleas Court of Tippecanoe County against Nathaniel Chauncey, Nathaniel Chauncey and Henrietta Chauncey, both of the last two Trustees under the will of Elihu Chauncey, seeking to appropriate Lot number Twenty three (23) in the Town of Chauncey and a strip of land one hundred and twenty-five feet wide, the center line thereof commencing in the southeast boundary line of said Lot number Twenty-three (23) and twenty-six (26) feet from the northeast corner of said lot, and running South sixty-three and one quarter (63¼) degrees East Fifteen Hundred sixty (1,560) feet to the Wabash River, as and for the use of an embankment or causeway for her bridge. And said Common Pleas Court on the 28th day of June, 1864, entered a judgment found on Order Book thirteen (13) page 214 of said Court decreeing that said Main Street Bridge Company stand seized in fee simple of said strip of land appropriated by said Bridge Company "as and for the use of an embankment or causeway for her bridge," upon payment of Thirteen Hundred Forty Seven Dollars ($1,347.00) damages within one year; and on July 26, 1864 said Main Street Bridge Company paid said damages in full and said defendants received the same.

And plaintiffs further aver that on October 24th, 1871 "the Main Street Bridge Company aforesaid, in consideration of Twenty Seven Thousand Three Hundred Dollars ($27,300.00) by warranty deed of that date conveyed to the Board of Commissioners of Tippecanoe County their toll bridge across the Wabash River and the Wabash and Erie Canal" now owned by them and situate at the foot
20 of Main Street in the City of La Fayette, together with the rights, levee and approaches thereto on both sides of said river and all and singular the appurtenances and privileges to the same belonging to whatsoever kind and description, except Lot numbered twenty three (23) in the Town of Chauncey."

And the plaintiffs further show that on the 30th day of June, 1875, defendant by its warranty deed of that date in consideration of Fifty dollars ($50.00) duly sold and conveyed to William Z. Martin a strip of land twenty two (22½) and one half feet wide off of the south side of said One Hundred twenty five feet strip so as aforesaid; appropriated by said Main Street Bridge Company, and by said Bridge Company conveyed to the defendant, extending from the north corner of Lot number fourteen (14) of Chauncey's Plat of Bottom Lands and running southeast parallel with the center line of the Levee to the Wabash River; which said deed reads in words and figures as follows:

"This indenture, made this 30th day of June, 1875, between the Board of Commissioners of Tippecanoe County, in the State of Indiana, of the first part and William Z. Martin of the County of Tippecanoe and State of Indiana of the second part, witnesseth; That whereas said Board of Commissioners having ordered the sale of the following real estate situate in Tippecanoe County, Indiana, and described as follows, to-wit: A strip of land twenty-two and one half ($22\frac{1}{2}$) feet in width commencing at the North corner of Lot numbered fourteen (14) in Chauncey's Plat of Bottom Lands and running southeast parallel with the center line of the Levee to the Wabash River. And Whereas, the Auditor of said county having given due and legal notice thereof according to law did on
21 the 28th day of April, 1875 at the Court House door in said county at public auction expose the said real estate for sale according to law, and the said William Z. Martin having bid therefor the sum of Fifty dollars ($50.00) and no person bidding more the same was openly struck off to the said William Z. Martin for the said sum of fifty dollars ($50.00) that being the highest bid for the same.

"Now Therefore to confirm to the said Wiliam Z. Martin the sale so made as aforesaid the said Board of Commissioners as aforesaid in consideration of the said sum of Fifty Dollars ($50.00) to the Treasurer of said county in hand paid by the said William Z. Martin the receipt whereof is hereby acknowledged have granted, bargained and sold and do by these presents grant, bargain, sell, convey, confirm and warrant to the said William Z. Martin, his heirs and assigns forever all the following real estate situate in the county of Tippecanoe and State of Indiana, to-wit: A strip of land Twenty-two and one half ($22\frac{1}{2}$) feet in width commencing at the North corner of Lot numbered fourteen (14) in Chauncey's Plat of Bottom Lands and running southeast parallel with the center line of the levee to the Wabash River. In Witness Whereof the said Board of Commissioners as aforesaid have hereunto set their hands and seal, the day and year first above written."

JOSEPH M. HERSHEY.
JOHN OPP.
JOHN P. OGLEBAY."

Attest:

PRIMUS P. CULVER,
Auditor.

Duly acknowledged and recorded in Deed Record 64 page 37 Records of Tippecanoe County, Indiana."

And the plaintiffs aver that they derive their title from the said Chaunceys, the said owners of the land so as aforesaid
22 appropriated by said Main Street Bridge Company by successive conveyances down to said William Z. Martin, and from said Martin by successive conveyances by warranty deed to these plaintiffs.

That these plaintiffs and these under whom they claim up to the time of the filing of this complaint have been in open, notorious uninterrupted and adverse possession of their said lands, under their claim of right through said conveyances, for more than twenty years.

Plaintiffs further show that Main Street in the City of La Fayette at its west end terminates at the Wabash River; that on the 9th day of September, 1913, a bridge extended across the Wabash River from the West end of Main Street in the City of La Fayette to the west bank of said river; that said bridge was constructed more than twenty years prior to the 9th day of September, 1913, and was constructed by and under the control of the defendant, that at the west end of said Main Street Bridge was constructed a large stone abutment; that from said abutment a levee causeway and approach to said bridge was constructed without any openings through or across the same for the passage of water; that it extended westerly for more than 1,200 feet, to the highland, the center line of which was the center line of said 125 feet strip appropriated by said Main Street Bridge Company; that the said levee causeway and approach constituted a public highway which had been maintained and used as such for more than twenty years prior to said 9th day of September, 1913, and said levee causeway and approach together with said bridge known as Main Street Bridge constituted and furnished the principal
23 thoroughfare and highway connecting the City of La Fayette with the Town of West La Fayette.

That West La Fayette is an incorporated town and has been for more than thirty years prior to the filing of this complaint, and said levee causeway and approach to said bridge was one of the public streets in said town and had been for more than twenty years prior to the 9th day of September, 1913.

That said approach to said bridge causeway and levee at the west end of said bridge was on the 9th day of September, 1913, paved with asphalt with cement curb and sidewalk, and was 37 feet above the low water mark of Wabash River; that said levee causeway and approach was constructed upon land that is usually known as "bottom lands," the surface of which was about twelve or fifteen feet above low water. That at the west end of said bridge the levee causeway and approach *was* 25 feet above the top of the bank of the river. That the west abutment of said bridge retained the east end of said levee causeway and approach, and protected the same from the waters of said river.

That on said 9th day of September, 1913, the plaintiffs' lands, said lots 52, 53 and 54 adjoined and abutted upon said approach causeway levee and abutment, on the south side thereof; and the remainder of plaintiffs' lands lie south of said lots and extend to the right of way of the Lake Erie & Western Railroad Company; that on the said right of way of said railroad Company, at the southern boundary of plaintiffs' lands said railroad company had constructed a bridge with an approach and levee extending westerly across said "bottom lands" of said river, and the same had so existed for more

than twenty years prior to the 9th day of September, 1913.
24 That the 22½ feet strips conveyed by said defendant to said William Z. Martin plaintiffs' remote grantor, constituted the 22½ feet off of the north end of plaintiffs' lots 52, 53, and 54 aforesaid. That said river at said La Fayette flows from north to south; that plaintiffs and the grantors immediate and remote had as aforesaid prior to said 9th day of September, 1913, been in possession and owners of the fee of plaintiffs' said lands so as aforesaid abutting on said highway and levee and bridge approach for more than 20 years prior to said 9th day of September, 1913, and had constructed an embankment or levee running north and south from the northwest corner of said Lot 52 to the right of way of said railroad company extending southerly from said levee and approach of said Main Street Bridge and attached and adapted the same thereto; that plaintiffs and their grantors had made fills of earth on the south side of said levee, approach and abutment of said Main Street Bridge on said lots 52, 53 and 54 and had constructed thereon valuable buildings and improvements extending across the north end of lots 52, 53 and part of lot 54; that said improvements and buildings had been so constructed that the same were adapted to the grade and conditions of said levee, causeway, and approach highway, and the ingress and egress thereto, to and from plaintiffs' property was unobstructed.

That the first floor of said buildings were constructed at the grade of said highway, and said buildings abutted upon the south side of the sidewalk on said street and highway.

That for more than twenty years prior to the 9th day of September, 1913, the plaintiffs and their immediate grantors had a special interest in said highway different from that of the public, and
25 were the owners of the fee of the lands occupied by said levee and highway adjacent to said plaintiffs' land subject only to the public use thereof as a highway. That plaintiffs and their grantors immediate and remote for more than twenty years prior to the 9th day of September, 1913; owned and had a special interest and easement in said levee and bridge abutment at the west end of said Main Street Bridge adjoining plaintiffs' property, and the maintenance of said bridge abutment and levee was necessary to the use and enjoyment of plaintiffs' property and the preservation of plaintiffs' soil, and in the protection of plaintiffs' property against waters of the Wabash River; that at the time of the said conveyance by the defendant to said William Z. Martin said levee, causeway and approach were constructed and said Martin and his grantee and these plaintiffs have ever since been entitled to the maintenance of the same and the free ingress to and egress from plaintiffs' property from and to said levee and approach and highway to be preserved.

That defendant owed a duty to plaintiffs to preserve, protect and maintain them in the quiet enjoyment of said 22½ feet off the north side of said lots 52, 53 and 54 so as aforesaid conveyed by defendant to said William Z. Martin, and in their special interest in said levee, approach and highway.

And plaintiffs aver that a portion of said highway and levee upon which plaintiffs' lots 52, 53 and 54 abutted had never been overflowed by the waters of the Wabash River since the time the same was constructed; that in the month of March, 1913, a most extraordinary flood and freshet occur-ed in the Wabash River, and the waters overflowed and were higher than has been known in
26 a period of "time to which the memory of man runneth not to the contrary"; that notwithstanding said extraordinary flood and freshet said levee and approach that was adjacent to and upon which plaintiffs' said lots 52, 53 and 54 abutted was not overflowed, and the plaintiffs' buildings and improvements thereon and the soil of said lots were fully and completely protected from injuries by the waters of said river, and that said levee and approach and abutment had furnished adequate and complete protection to said lots 52, 53 and 54 against waters of the Wabash River for a period of more than twenty years prior to the 9th day of September, 1913, and were adequate and sufficient to furnish said lands all necessary future protection from the waters of said river.

The plaintiffs further aver that at the time of said extraordinary flood in the month of March, 1913, the high waters of said river injured one of the piers of said Main Street Bridge and the same settled and injured said bridge; that thereafter the defendant took such necessary steps and action to the end that on the 9th day of September, 1913, said defendant let and entered into a contract for the construction of a new bridge across said Wabash River from the west end of Main Street in said city of La Fayette, according to certain plans and specifications. That said plans and specifications provide, among other things, for the construction of a deck, concrete and steel girder bridge of six spans, each 125 feet long and resting upon a concrete abutment at each end, and five concrete piers under the end of the respective spans; that by said plans and specifications the west end of said new bridge was located 170 feet farther west than the west end of the old bridge; that the first pier from
27 the west end of said new bridge was located immediately in front of said plaintiffs' lots 52 and 53 and the plaintiffs' buildings thereon constructed; that said plans and specifications for said new bridge provide that the floor of said new bridge will be nine feet higher than the grade of the said levee in front of plaintiffs' said buildings; that the floor of said new bridge will be fifty six feet in width; that the aforesaid pier of said new bridge in front of plaintiffs' property will be 67 feet extending north and south; that the center line of said new bridge in front of plaintiffs' said property is the center line of said levee; that said levee at plaintiffs' land was 80 feet in width; that said new bridge according to said plans and specifications will have a roadway 40 feet in width, sidewalks extending from the curb at each side of said roadway eight feet in width; that on each outer side of said bridge will be constructed, according to said plans and specifications, a massive rail made of a base, turned ballisters and cap rail of stone, with massive posts at

the end of each span over said piers; that said plans and specifications provide that when complete the top of said hand rail will be 13 feet above the said grade of said levee as the same was in front of plaintiffs' buildings; that said plans and specifications provided that the pier in front of plaintiffs' said property should be constructed of concrete resting upon piling; that the bottom of said concrete in said pier should be placed at a depth of 12 feet below low water mark; that said pier at its base was of a thickness or extended east and west 15 feet and north and south 75 feet; that said plans and specifications provided that the contractor should remove said old abutment at the west end of said old bridge.

28 That the defendant on the 20th day of December, 1913, duly let and entered into a further contract for the improvement of said levee and highway from the west end of the new bridge to the west end of said levee to furnish a suitable approach, levee and highway to the west end of the new bridge according to certain plans and specifications; that it is provided in said last mentioned contract among other things in said plans and specifications for the removal of said levee and approach to said old bridge extending along and across and in front of said plaintiffs' Lots 52, 53 and 54.

That according to the provisions of the plans and specifications for said new bridge and the improvements of said levee for an approach and levee to said new bridge, the old abutment at the west end of the old bridge and the levee extending entirely across the north side of plaintiffs' land was removed and taken away, and the entire north side of plaintiffs' land and property left without protection against the waters of said river.

And plaintiffs aver that soon after the letting of said contract by the defendant for the construction of said new bridge the said contractor entered upon the execution of his said work and commenced excavating said levee in front of plaintiffs' said property at the location of the first pier east of the West end of said new bridge; that said specifications required such excavation to go 50 feet below the surface of said highway in front of plaintiffs' property and immediately adjoining said plaintiffs' buildings; that said contract and specifications made no provison whatever for the protection of the soil of plaintiffs' land from caving or no other provision for

29 the protection of plaintiffs' property, or any provision whatever for any lateral support to plaintiffs' property or the soil thereof.

That under said plans and specifications it was impossible to construct said pier and make the necessary excavation therefor without causing the fall of plaintiffs' buildings and the earth supporting them into the said excavation.

That said defendant on the 20th day of December, 1913, served upon the plaintiffs the following notice, addressed to the plaintiffs severally, to-wit:

"La Fayette, Ind., Dec. 20, 1913.

You are hereby notified that the contractor will begin excavation December 22, 1913, for a pier for the new Main Street Bridge opposite property in which you are interested at the West end of the old bridge across the Wabash River at La Fayette, Indiana, this property being commonly known as 'Red Wharf.'

The excavation for this pier will necessarily have to go below the foundation of your buildings, this notice is given you in order that you may take steps to protect your property as far as possible.

Witness the seal of the Board of Commissioners of Tippecanoe County, State of Indiana.

GEO. W. BAXTER,
Auditor Tippecanoe County, Indiana."

That plaintiffs' buildings on said property were constructed as aforesaid of concrete and cement block and could not be secured by plaintiffs from falling into said excavation, nor could
30 plaintiffs protect their soil from falling into said excavation; that unless removed the destruction of said buildings by the prosecution of said work in the construction of said pier would be inevitable; that thereupon in order to save as much of the value of said buildings as possible said plaintiffs offered the same for sale, and after using all due effort and diligence to obtain highest price therefor plaintiffs sold said buildings for the sum of $25.00, that sum being the highest and best bid they could obtain for the same; and said buildings above their concrete foundation were removed; that thereafterwards large quantities of plaintiffs' soil on his said lot caved into said excavation, and said contract to protect his new work and the lives of his employees, broke up, destroyed and removed a portion of said concrete foundations; that by the terms of said contract for the construction of said new bridge, and by the plans and specifications therefor the defendant assumed all damages to private property occasioned by the construction of said work; that the work of the construction of said new bridge and the improvement to the highway and approach at its west end has been completed according to said contracts, plans and specifications; that the excavation of said pier has been in front of plaintiffs' property completed and said pier has been erected and said levee and highway in front of plaintiffs' property and on the north side thereof, has been removed and destroyed; that the waters of the Wabash River have free access about said pier and passage under said new bridge, and because of said excavation and the removal of said levee, and the removal of said abutment, the waters of the Wabash River are turned against and over and upon the surface of plaintiffs' property,
31 and carry thereon vast quantities of water, sand, earth and débris, and will wash away plaintiffs' soil; that by said excavations caused by the defendant as aforesaid, the west bank of the Wabash River, has been extended and excavated westerly, and the waters of said river turned in, upon and over plaintiffs' said lands; the Wabash River has been widened at said pont; that it was the

design of the defendant in the construction of said new work to widen and provide for a larger and greater waterway for the Wabash River beneath its said new bridge; and that said bridge abutment was removed and said levee was removed that the water might have free passage under such new bridge, as extended.

Plaintiffs aver that by the construction of said new bridge and levee and approach at its west end aforesaid, the highway existing for more than twenty years in front of and adjoining the plaintiff's property and upon which it abutted has been destroyed and removed, and its soil excavated and carried away; that the plaintiffs owned the right and easement of all the support and protection against high waters of the Wabash River which plaintiffs' property had received, and of which plaintiffs and their grantors, immediate and remote, had been — possession for more than 20 years prior to said 9th day of September, 1913.

That plaintiffs' special interest in the easement in said highway, levee and abutment has been destroyed; that plaintiffs' land- by the construction of said work by said defendant are overflowed and rendered of no value; that all ingress and egress of plaintiffs from their said lands and improvements to said highway *has* been destroyed, and no ingress or egress can be provided for plaintiffs' property to said highway, that plaintiffs' property is placed within the banks of the Wabash River, caused by the construction by the defendant of said works.

32 Said plaintiffs' said property immediately prior to the 9th day of September, 1913, was of the value of $12,000.00 that the defendant has made to plaintiffs no payment or compensation therefor; that no proceedings or appropriation were begun or made by said defendant for the taking of said property; that as aforesaid said highway and levee at the west end of said old bridge in front of and along the north side of plaintiffs' property was a street in the incorporated Town of West La Fayette. That no proceedings have been taken by said town for the change of grade of said street, but that said defendant has taken plaintiffs' property and easements in the construction of said bridge and its approach without making any compensation therefor, and by the construction of said works has injured and damaged plaintiffs' property to the extent of its entire value, to-wit: in the sum of Twelve Thousand Dollars ($12,000.00) together with interest thereon from said 9th day of September, 1913.

Wherefore plaintiffs pray for judgment against the defendant in the sum of Thirteen Thousand Dollars; and for all other and proper relief.

CHARLES M. SNYDER,
PARKS AND PARKS,
Attorneys for Plaintiffs."

and the defendant is ruled to answer herein on January 16, 1919, and day is given.

Tuesday, January 14th, 1919, 8th Day.

554.

WILLIAM RANDALL et al.

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

Damages.

Comes now the defendant, by Daniel P. Flanagan; Al-
33 len Boulds and Clyde H. Jones, its attorneys, and files its demurrer to the amended Complaint, herein, reading as follows, to-wit:

Defendant's Demurrer to Each Paragraph of Amended Complaint.

"STATE OF INDIANA,
Tippecanoe County, ss:

In the Tippecanoe Superior Court, at the January Term, 1919.

WILLIAM RANDALL and GEORGE AKERS, Plaintiffs,

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, Defendant.

Demurrer.

The defendant demurs to the complaint herein and for cause of demurrer says: That neither paragraph of complaint, separately and severally considered, state facts sufficient to constitute a cause of action.

DANIEL P. FLANAGAN,
ALLEN BOULDS,
CLYDE H. JONES,
Attorneys for Defendant.

Memo. with Demurrer to Amended Complaint.

Memoranda.

1. Neither paragraph of complaint alleges any negligent act on the part of the defendant, and, therefore, is not good as against demurrer on the theory that either paragraph of complaint sounds in tort.

2. Neither paragraph of complaint alleges any facts which show that there was any contractual duty on the part of the commissioners to pay the plaintiffs for their alleged damages.

3. No facts are alleged in either paragraph of complaint which show, or tend to show, that the plaintiffs are entitled to re-
34 cover on the theory that any statutory liability exists by reason of, or on account of what it is alleged the commissioners did.

4. It affirmatively appears in both paragraphs of complaint that the defendant, in the building of the bridge and embankment or causeway, acted within the scope of its authority and under statutory powers expressly conferred upon it, and, it also affirmatively appears, in each paragraph of complaint, that there was no physical taking of any of the property of the plaintiffs, or either of them, and the only alleged damages which appear are consequential damages which are held to be damnum absque injuria.

5. It affirmatively appears in the second paragraph of complaint that the plaintiffs' remote granters were the owners of the real estate held by the plaintiffs as well as the real estate now covered by the street and highway, and, it also affirmatively appears that the land now used by the defendant county, in the construction of its bridge and causeway, was condemned by the defendant's immediate grantor, and, that, therefore, the defendant county had not only an easement in the highway, but *were* in fact the owners of the fee, and that the plaintiffs' grantors have received due compensation for the taking of such real estate as now used by the county by condemnation, and that any additional use of the real estate by the county would not be considered subjecting it to a new or additional servitude.

6. The allegations in the complaint that the plaintiffs had a special interest in the highway and had an easement for the purposes
35 of ingress and egress, add nothing to the complaint. The plaintiffs could not acquire, as against the sovereign power, a special interest or easement which would preclude such sovereign power from exercising its duties or obligation to the public in maintaining its highways at all times in shape for use by the traveling public.

7. The defendant was under no legal obligation to maintain the old approach to the bridge because it incidentally afforded protection to the property of the plaintiffs, and they could acquire no prescriptive right or easement in such approach for such purpose.

8. The construction of a new bridge, and the approach or causeway, constructed as it was, higher and wider than the old one, was in effect but the raising of the grade of the traveled portion of the highway for which the law allows no damages to abutting owners.

9. The allegation in the second paragraph of complaint in reference to the plea of source of title would not create any liability against the county for the work done as alleged in the complaint, for the reason that the defendant county would not be bound by any covenants of warranty in the deed. Such covenants would be against public policy and would be in derogation of the rights of the public whom the Board of Commissioners represent. However, giving the

matter its most favorable construction and due allowance for the effect of the warranty, no implied contract arises to pay additional damages to abutting land owners in the event of the raise of the grade or the widening of the bridge. The defendant in the exercise of its governmental functions cannot be estopped from exercising the same either by contract, laches, or prescription.

36 10. It is shown by the allegations in each paragraph of complaint that the real estate owned by the plaintiff was what is known as "bottom lands," and was so located by nature as it might be subjected to overflow of water from the Wabash River and the plaintiffs had no right to rely upon the fact that the bridge and its approaches thereto would always remain the same, and they took title to the property charged with the knowledge that such bridge and its approaches might be changed, if the shifting conditions brought about by the improvement of the surrounding country demanded it to be changed. Their construction of the small house on the abutting land could not obstruct the improvement such as progress of the times might require.

11. The Town of West Lafayette, and the City of LaFayette Indiana, by express provision of the statute, have sole jurisdiction over the bridge described in the complaint, and the approaches thereto, and the defendant acted only as the agent of such municipal corporations in drawing the specifications, making the contract and in the construction of the work, and if the plaintiffs had otherwise stated facts sufficient to create a liability such liability would be against such municipal corporations rather than against this defendant.

12. The defendant in this action is not liable to the plaintiffs as abutting land owners for changes in the grade to the approach of the bridge built, nor in widening the bridge within the municipal corporations, unless it did so without authority of law, and in a careless and negligent manner, or unless such liability is fixed upon the defendant by the Constitution or some provision of the
37 statute. No such liability is shown by any allegation of either paragraph of complaint.

13. The statute expressly confers upon Boards of County Commissioners, authority to build bridges costing over five hundred dollars within the corporate limits of cities and towns. It, therefore, casts upon such Board a discretionary power as to the manner in which such approaches and bridges should be built, and the Board of Commissioners are not liable for damages in discharging their discretionary duty, unless there is a gross abuse of such discretion. Allegations in the complaint that the defendant was proceeding to excavate upon the highway without making provision for the protection of the soil of plaintiffs' land and thereby taking away its lateral support adds nothing to the complaint as the damages, if any, for such conduct, were consequential for which the law affords no recovery.

14. It is presumed, in the absence of countervailing facts alleged in the complaint, that the defendant county acted with due care and fully within the scope of its authority in making all of the improvements alleged in the complaint.

15. The complaint in each paragraph discloses that in the year 1913, the Wabash River rose to a point higher than it had ever been known to rise before. As alleged in the complaint higher than has been known in a period of "Time to which the memory of man runneth not to the contrary." And this flood and freshet had washed out one of the piers of the bridge from which it affirmatively appears that it was the duty of the commissioners to either replace the bridge in its original condition where it might again be
38 washed out, to be repaired again at the expense of many thousands of dollars to the county, or whether it should, in the exercise of its discretion build a new bridge, widen the same, raise the surface of the approach or causeway, so as to afford protection to the highway under any conditions that might arise.

It would seem from a reading of these paragraphs that the action of the commissioners should be commended, rather than condemned by suing them for damages.

DANIEL P. FLANAGAN,
ALLEN BOULDS,
CLYDE H. JONES,
Attorneys for Defendant."

And day is given.

Demurrer to First Paragraph Amended Complaint Sustained. Exceptions. Demurrer to 2nd Paragraph Amended Complaint Sustained. Exception.

Thursday, January 16, 1919, 10th Day.

554.

WILLIAM RANDALL et al.

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

Damages.

Come now the parties, in person, and by their counsel as heretofore appearing, and the court being fully advised and satisfied in the premises does now sustain the demurrer to the first paragraph of Amended complaint, to which ruling of the Court the plaintiffs except, and the Court further sustains the demurrer to the second paragraph of complaint, to which ruling of the court the plaintiffs except, and the plaintiffs failing and refusing to amend their amended complaint or plead further abide said ruling, and the Court renders judgment on the demurrer.

Judgment on Demurrer to Amended Complaint.

It is therefore considered and adjudged by the Court that the plaintiff take nothing by this action, and that the defendant
39 recover of the plaintiffs its costs and charges in this cause laid out and expended.

Plaintiffs Pray Appeal. Appeal Granted. Bond Approved.

And comes now the plaintiffs, by Parks & Parks, their attorneys, and prays an appeal to the Supreme Court, and the Court being fully advised does now grant said appeal upon the plaintiffs filing a bond within thirty days in the sum of Two Hundred Fifty Dollars, with John F. Greenburg surety thereon. Bond approved, and day is given.

Appeal Bond Filed.

Filed Apr. 11, 1919. Patrick J. Lynch, Clerk.

Friday, February 14, 1919, 35th Day.

554.

WILLIAM RANDALL et al.

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

Damages.

Appeal Bond.

Comes now the plaintiffs, by Parks & Parks, their attorneys, and file their appeal bond, said bond reading as follows, to-wit:

STATE OF INDIANA,
County of Tippecanoe, ss:

In the Superior Court, to the January Term, 1919.

WILLIAM RANDALL, GEORGE S. AKERS,

vs.

BOARD OF COMMISSIONERS TIPPECANOE COUNTY.

Appeal Bond.

Know all men by these presents, That we, William Randall and George S. Akers, as principals and John F. Greenburg as surety, are

held and firmly bound unto Board of Commissioners of Tippecanoe County, the State of Indiana, in the penal sum of Two Hundred Fifty ($250.00) Dollars for the payment of which well and truly to be made and done, we bind ourselves, our heirs, executors
40 and administrators and assignees jointly and severally firmly by these presents.

Sealed with our seal and dated this — day of February, 1919.

The condition of the above obligation is such that whereas, heretofore, to-wit: on the 16th day of January, 1919, the said Board of Commissioners in the Superior Court of said county and state aforesaid, recovered a judgment against the said William Randall and George S. Akers, and costs of suit. From which said judgment of said Superior Court, the said William Randall and George S Akers has taken an appeal to the Supreme Court of Indiana.

Now, therefore, if the said William Randall and George S. Akers shall and will well and duly prosecute said appeal and abide by, and pay the judgment and costs, which may be rendered or affirmed against them, then this obligation to be null and void, otherwise to be and remain in full force and effect.

WM. RANDALL.
GEO. S. AKERS.
JOHN F. GREENBURG."

Præcipe.

Filed Apr. 11, 1919. Patrick J. Lynch, Clerk.

Be is further remembered, that on March 17, 1919, said plaintiffs, by their counsel, filed in the Office of the Clerk of said Court the præcipe for transcript of part of the record in said cause, for use on appeal of this cause to the Supreme Court of the State of Indiana, said Præcipe reading as follows, to-wit:

"La Fayette, Ind., March 17, 1919.

Tippecanoe Superior Court.

WM. RANDALL et al.

vs.

BOARD OF COMMISSIONERS.

41 The Clerk of said Court will prepare transcript on appeal to Supreme Court of the record showing leave granted to file an Amended Complaint and the filing of Amended Complaint on January 6, 1919, and the entire subsequent record in said cause and

all papers filed in said cause on and subsequent to said date of January 6, 1919.

PARKS AND PARKS,
Attorneys for Plaintiffs."

Filed Apr. 11, 1919.

PATRICK J. LYNCH,
Clerk.

42 *Clerk's Certificate.*

Filed Apr. 11, 1919. Patrick J. Lynch, Clerk.

STATE OF INDIANA,
Tippecanoe County, ss:

In the Superior Court of Tippecanoe County, Indiana.

554.

WILLIAM RANDALL, GEORGE S. AKERS

vs.

BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

I, William W. Johnson, Clerk of The Tippecanoe Circuit Court, and Ex-officio Clerk of the Superior Court of Tippecanoe County, State of Indiana, do certify that the foregoing transcript contains true and complete copies of all the entries in said cause commencing with leave granted plaintiffs to file an amended complaint in two paragraphs, on January 6, 1919; and of all subsequent entries in said cause; and of all papers filed in said cause on and subsequent to said January 6th, 1919, in accord with plaintiffs' precipe herein for use on appeal to the Supreme Court.

In Witness Whereof, I hereunto set my hand and affix the seal of said Court at my office, in La Fayette, Indiana, this 10th day of April, 1919.

[SEAL.] WILLIAM W. JOHNSON,
Clerk of Tippecanoe Circuit Court & ex-Officio Clerk of the Tippecanoe Superior Court of Tippecanoe County.

43 STATE OF INDIANA:

In the Supreme Court.

WILLIAM RANDALL, GEORGE S. AKERS, Appellants,

vs.

BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA, Appellee.

The appellants say there is manifest error in the judgment and proceedings in this cause in this:

1. The court erred in sustaining appellee's demurrer to the first paragraph of appellants' amended complaint.

2. The court erred in sustaining appellee's demurrer to the second paragraph of appellants' amended complaint.

PARKS AND PARKS,
CHARLES M. SNYDER,
Attorneys for Appellants.

Filed Apr. 11, 1919.
PATRICK J. LYNCH,
Clerk.

44 And afterwards, towit: On the 12th day of May, 1919, the same being the 145th Judicial day of the November Term, 1918, of said Supreme Court the following further pleas and proceedings were had in said cause, towit:

Come now the parties by their counsel, and this cause is submitted to the court for judgment and decree as provided by an act of the General Assembly of the State of Indiana, approved April 13th, 1885, and the rules of said Supreme Court adopted in relation thereto.

And afterwards, towit: On the 10th day of July, 1919, the same being the 40th Judicial day of the May Term, 1919, of said Supreme Court, the following further pleas and proceedings were had in said cause, towit:

Come now the appellants by counsel and file their brief (8) in the words and figures following:

And afterwards, towit: On the 21st day of July, 1919, the same being the 49th Judicial day of the May Term, 1919, of said Supreme Court, the following further pleas and proceedings were had in said cause, towit:

Come now the appellees by counsel and file a petition for an extension of time in which to file brief in the words and figures following:

STATE OF INDIANA:

In the Supreme Court.

No. 23567.

WILLIAM RANDALL et al., Appellants,

vs.

BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA, Appellee.

Appealed from Tippecanoe Superior Court.

45 *Appellee's Petition for Extension of Time for Filing Brief.*

The appellee would respectfully represent and show to the court that this action was commenced more than three years ago, and was, on affidavit for change of venue, venued to the Montgomery Circuit Court, and while said action was pending in said court, one of the appellee's counsel, namely, Mr. Clyde H. Jones, who then resided in the City of Crawfordsville, was retained by the appellee as counsel to represent them in said cause; that said cause was pending in the Montgomery Circuit Court for several years, and afterwards, was, by agreement of the parties, transferred to the Superior Court of Tippecanoe County, where an amended complaint was filed and said cause of action disposed of on demurrer.

The appellee would show to the court that during the time said cause was pending in the courts that the person-el of the appellee Board was changed by election several times, and on account of such changes there has been three separate county attorneys representing said county, and that none of said attorneys were ever familiar with the matters involved in said cause, but during all of the time that said cause was pending in the courts its counsel, Mr. Jones, aforesaid, had charge of the case for the appellee; that afterwards, the said Clyde H. Jones removed to the City of La Fayette, and continued to represent said appellee county in said cause, and the appellee would respectfully show to the court that the said Jones is the only attorney connected with said cause who is and was familiar with the issues therein, and he had given said cause attention, and that said appellee on that account desires that said counsel represent it in this court and file the brief for said county.

46 Said appellee would show that said cause is an action for damages against the appellee county in the sum of $13,000.00 alleged to have been sustained by appellants for damage to their real estate in the construction of a bridge across the Wabash River between the Cities of La Fayette and West La Fayette; that said cause was submitted on the 12th day of May, 1919, and the time for the filing of appellee's brief will expire on August 10, 1919. That this court has jurisdiction of said cause and the brief of appellee will be upon the merits of said cause.

Appellee would further show to the court that the appellants have filed a forty-two page brief, containing the citation of numerous authorities, involving a large array of decisions from the different states in the Union, including many decisions in the United States Supreme Court, and that it will require several weeks for the appellee's counsel to examine said authorities and to have the appellee's brief prepared and printed, and that counsel for appellee who is to file said brief and who is familiar with said cause has arranged in the meantime to take a vacation, and that appellee believes that in order that it should have sufficient opportunity to properly answer said brief the time for the filing thereof should be extended for forty-five days.

Wherefore, appellee prays the court for an order to be herein made and entered extending the time for the filing of its brief herein up to and including September 25, 1919.

Respectfully submitted,

D. P. FLANAGAN,
JONES & JACKSON,
Att'ys for Appellee.

47 STATE OF INDIANA,
Tippecanoe County, ss:

Clyde H. Jones, being first duly sworn on his oath says: That he is one of the attorneys for the appellee in the above entitled cause, and that he has read over and is familiar with the contents of the above and foregoing petition, and has authority to make and makes this affidavit for and on behalf of said appellee.

Affiant says that the matters contained therein are true in substance and in fact as he verily believes.

CLYDE H. JONES.

Subscribed and sworn to before me this July 19, 1919.

[SEAL.] B. M. BEGANE,
Notary Public.

Commission expires September 24, 1919.

(Endorsed:) No. 10623 (No. 23567). In the Supreme Court of the State of Indiana. William H. Randall, et al., Appellant-, v. The Board of Commissioners of Tippecanoe County, Indiana, Appellee. Petition for Extension of Time in which to File Answer Brief of Appellee. Filed Jul. 21, 1919. Patrick J. Lynch, Clerk. Daniel P. Flanagan, Allen Boulds, Clyde H. Jones, attorneys for appellee. Time for filing appellee's brief extended to & including Nov. 1, 1919. C. J. R. July 22/19. Transferred to Appellate Court. Myers, J.

48 And afterwards, to wit: On the 22nd day of July, 1919, the same being the 50th Judicial day of the May Term, 1919 of said Supreme Court, the following further pleas and proceedings were had in said cause, to wit:

Comes now the Court on its own motion and transfers the above entitled cause to the Appellate Court, No. 10632, for want of jurisdiction.

And afterwards, to wit: On the same day, the following further pleas and proceedings were had in said cause, to wit:

The Appellate Court being fully advised grants appellees petition for an extension of time heretofore filed, and brief to be filed on or before November 1, 1919.

And afterwards, to wit: On the 30th day of October, 1919, the same being the 136th Judicial day of the May Term, 1919 of said Appellate Court, the following further pleas and proceedings were had in said cause, to wit:

Come now the appellees by counsel and file their brief (8) and their request for oral argument in the words and figures following:

And afterwards, to wit: On the 13th day of November, 1919 the same being the 149th Judicial day of the May Term 1919 of said Appellate Court, the following further pleas and proceedings were had in said cause, to wit:

Come now the appellants by counsel and file a petition for an extension of time in which to file reply brief, and on the same day, the court being fully advised, said petition was granted and brief to be filed on or before December 20, 1919.

49 And afterwards, to wit: On the 19th day of December, 1919, the same being the 23rd Judicial day of the November Term 1919 of said Appellate Court, the following further pleas and proceedings were had in said cause, to wit:

Come now the appellants by counsel and file their reply brief (8) in the words and figures following:

And afterwards, to wit: On the 5th of November, 1920, the same being the 143rd Judicial day of the May Term 1920 of said Appellate Court, the following further pleas and proceedings were had in said cause, to wit:

Come now the parties, and the Court being fully advised in the premises, now sets said cause for oral argument for November 24th 1920, and notices thereof are duly issued.

And afterwards, to wit: On the 5th of January, 1921, the same being the 39th Judicial day of the November Term 1920 of said Appellate Court, the following further pleas and proceedings were had in said cause, to wit:

Come now the parties by counsel, and the Court being fully advised in the premises, now resets said cause for oral argument for January 26, 1921, and notices thereof are duly issued.

And afterwards, to wit: On the 10th of June, 1921, the same being the 17th Judicial day of the May Term 1921, of said Appellate Court,

the following further pleas and proceedings were had in said cause herein:

No. 10623.

WILLIAM RANDALL et al.

vs.

BOARD OF COMMISSIONERS, etc.

Come now the parties by counsel and the court being advised in the premises affirms the judgment of the court below with the following opinion pronounced by Enloe, C. J.:

50 This was an action to recover damages alleged to have been sustained by appellants, to certain real estate owned by them, located just west of the Wabash river, and immediately south of the west end of the wagon bridge across said river, which said bridge is at the west end of Main street, in the city of La Fayette.

To an amended complaint, in two paragraphs, a demurrer was sustained, and appellants, refusing to further plead, judgment was rendered against them for costs, from which judgment this appeal is prosecuted.

The errors assigned challenge the correctness of the rulings on said demurrer.

The paragraphs of complaint are each quite lengthy, but the following material facts appear from the averments thereof:

In 1863 a corporation, known as "The Main Street Bridge Company," was duly organized under the laws of the State of Indiana, for the purpose "of constructing and owning a bridge across the Wabash river in Tippecanoe county, Indiana, and of construction and owning an embankment or causeway, which shall be most direct across the Bottom Land on the west side of Wabash river and connect said bridge with the said road leading westward from La Fayette.

It further appears from the averments of said complaint, that said bridge company brought suit against the then owners of said "bottom land," for the purpose of acquiring, by condemnation proceedings, a strip of ground one hundred twenty-five (125) feet wide, and fifteen hundred and sixty (1,560) feet long, extending from the Wabash river westwardly across the said "bottom land," said strip being in the line of said West Main street projected; that such proceedings were had in said cause that on the 28th day of June, 1864, the said court entered its judgment and decree, "that said Main Street Bridge Company stand seized in fee simple of said strip of land, appropriated by said Bridge Company, as and for the use of an embankment or causeway for her bridge, upon the payment of Thirteen hundred forty-seven ($1,347) dollars damages, within one year"; that in July, 1864, said damages were paid, and said Bridge Company at once entered upon and took possession of said strip of land; that in 1871 said Bridge Company sold, and in consid-

eration of Twenty-seven Thousand Three Hundred Dollars
51 paid to it, conveyed by its warranty deed, to appellee herein, its toll road and bridge across the Wabash river, situate at the foot of Main Street in the City of La Fayette, together with all the rights, privileges, and appurtenances thereunto belonging; that in June, 1875, the appellee, by its warranty deed, conveyed to one Martin, a remote grantor of appellant, a strip of ground twenty-two and one-half (22½) feet wide, off the southerly side of said 125 foot strip, said strip extending from the east end of said 125 feet strip for some distance to the west, and which strip now forms the north part of appellant's lands, alleged to have been damaged, and for which this suit is brought; that for more than 20 years prior to March, 1913, a bridge, erected by appellee, for the accommodation of wagons and other vehicles, had been maintained, together with the embankment, or causeway, upon which the roadway was constructed by the appellee herein; that the high waters of said river, in March, 1913, undermined one of the piers of said bridge, causing the same to settle, and said bridge to become unsafe; that in September, 1913, the appellee entered into a contract for the construction of a new bridge across the Wabash river at said point, to take the place of the one so injured in the preceeding March; that according to the plans and specifications adopted for said new bridge, the west end thereof was located 170 feet to the west of the west abutment of the old bridge.

It further appears, from the averments of the complaint, that the said levee or causeway, extending westward from the west abutment of said old bridge, was 80 feet in width, and was constructed along the center line of said 125 foot strip; that said levee was 25 feet high; that the low water banks of said river, at said point, are 12 feet high; that said levee or causeway, was a public highway, and was without openings in said embankment; that from the west abutment of said old bridge, a levee had been constructed southward to the right of way and embankment of the L. E. & W. Ry., and along the east line of appellant's land, thus protecting his said lands from overflow by the water from said river; that west of said bridge and on the southerly side of said highway a sidewalk had been constructed, and that the appellant was the owner of a building, situate on the northerly end of his said land, which building had been so build that the floor thereof was on a level with said sidewalk; that said sidewalk
extended to the southerly property line of appellee, and that
52 said building of appellant was constructed along his northerly line, and abutted said sidewalk, and that appellant had access, for ingress and egress, to and from said building, to said highway across said sidewalk.

It further appears, that in preparation for the construction of said new bridge, the east end of said levee, or causeway, for a distance of 170 feet—from the old West Pier to the new West Pier—was entirely removed and taken away; that a pier for the new bridge is located 125 feet east of said west pier, and north of appellant's land; that said portion of said new bridge conforms to the old levee, or

causeway, as to the center lines thereof; that said new bridge, as to the floor thereof, is nine feet higher than the old roadway; that the roadway of said new bridge is forty feet in width from curb to curb, with a sidewalk eight feet in width on either side thereof; that on both sides of said bridge is constructed a massive stone railing; that since the removal of said embankment the waters of said river flow over and upon the surface of appellant's property, and carry vast quantities of earth, sand and débris thereon; that appellant's access to said property has been, by the work of building said bridge as aforesaid, entirely cut off and destroyed and that said property is now of no value, and that they have sustained damage in the sum of Twelve Thousand Dollars.

From the foregoing facts it will be seen that to the south of said new bridge, and between the said bridge and appellant's northerly property line, is a space of about ten feet,—land owned by the appellee,—and that appellant is without any means of getting from said roadway, or bridge, onto his land.

The theory of appellant's complaint is manifest from the following averments, as found in his complaint, viz:

"That plaintiffs and their grantors, immediate and remote, for more than twenty years prior to the 9th day of September, 1913, *owned, and had a special interest and easement in said levee and bridge abutment*, at the west end of said Main Street bridge, adjoining plaintiffs' property, and the maintenance of said bridge abutment and levee was necessary to the use and enjoyment of plaintiff's property, and the preservation of plaintiff's soil, and in the protection of plaintiff's property against waters of Wabash River; * * * that the plaintiffs owned the right and *easement of all the support and protection, against high waters of the Wabash River,*
53 *which plaintiffs' property had received, and of which plaintiffs and their grantors*, immediate and remote, had been in possession for more than twenty years prior to said 9th day of September, 1913." (Our italics.)

There is no allegation in said complaint that the appellee herein, in any way, in the matters connected with the building of said new bridge, did not follow the law. In fact, the said complaint expressly alleges,—"That the defendant, acting within the scope of its authority," let the contract for the removal of said levee. It is also expressly alleged,—"that the defendant, acting within the scope of its authority, took such necessary steps and action to the end that on the 9th day of September, 1913, said defendant let and entered into a contract for the construction of a new bridge across said Wabash River from the west end of Main Street, in said City of La Fayette, according to certain plans and specifications."

It further appears from the averments of the complaint, that no part of appellant's land has been actually taken and appropriated in said work. In fact, as before stated, the new bridge, and the abutments thereof are entirely on land owned by appellee. The averments show that to the south of the piers of said bridge, there is 3½ feet of land owned by appellee.

That the appellants have suffered a damage in the matter of this property, is without question, but the nature of this damage, whether direct or simply consequential, is the matter we must now consider.

The appellee insists, that the averments of the complaint show, that no property of appellant's was taken, and that therefore the damage complained of is merely consequential, and it therefore insists there can be no recovery. The appellants insist that they had a "special interest and easement in said levee and bridge abutment," which interest and easement was property, and which was taken, and also that they had an easement and property right in said levee and highway, as a way of egress and ingress, from and to their said premises, and which also was taken, and that therefore they are entitled to the damage they have sustained.

The answer to the question presented, as we view it, depends upon the validity of the claim of appellants to a property right in and to the said embankment, and to a way of egress and ingress across said side walk. If appellants had any property right as
54 against the appellee, in and to said embankment, that right was taken from them. If they had any property right of egress and ingress, as against the appellee, in and to said sidewalk, that right was also taken away from them. If, on the other land, the appellants had no such rights as those claimed, then the provision of our constitution relative to the taking of private property for public purposes, can, as we view it, have no application to the fact of this case, and the damages sustained by appellants are simply consequential.

The Main Street Bridge Company was authorized by statute to acquire a fee of the lands on which to construct its road and bridge, (§702, R. S. 1852) and in the proceedings in condemnation, brought by it, as set forth in the complaint, it did, by the judgment and decree of said court, acquire title to said 125 foot strip, in fee simple This title it conveyed to the appellee, which still holds the same, except said 22½ foot strip sold as hereinbefore stated. But it is urged that the sale of said strip conveyed a reversionary interest in the residue, to the center line of said 125 foot strip, and that this gave the basis for the right of easement claimed.

It will be noted that the deed to the said 22½ foot strip conveyed the same by definite bounds. As said by Chancellor Kent: Kent's Com. 12th Ed. Vol. 3, p. 572,

"But it is competent for the owner of a farm or lot having one or more of its sides on a public highway to bound it by express terms on the side or edge of the highway so as to rebut the presumption of law and thereby reserve for himself his latent fee in the highway. He may convey the adjoining land without the soil under the highway, or the soil under the highway without the adjoining land. If the soil under the highway passes by a deed of the adjoining land, it passes as parcel of the land and not as appurtenance." See also Gebhardt v. Reeves, 75 Ill. 307; Helm v. Webster, 85 Ill. 116.

By the deed executed by the appellee, conveying said strip, it was conveying a part of the land held by it in fee for highway purposes.

It is a maxim of the law that public grants are to be construed strictly. Nothing passes by implication. U. S. v. Arrendo, 6 Peters, 736, and authorities there cited. This is especially true where the right claim tends to impair the State's power to exercise its ordinary governmental functions, or to suspend its powers of improvement and rendering safe, an important line of travel
55 Charles River Bridge v. Warren Bridge, 11th Peters, 420.

In harmony with the foregoing authorities we hold that by and under the said deed executed by appellee, conveying said 22½ foot strip, appellants, nor their remote grantor, acquired any reversionary right to the fee of said highway, nor to any special interest therein.

Did the appellee acquire any "special interest" or easement in and to said embankment and highway, by reason of an uninterrupted use of the same as a way of egress and ingress to their property, by themselves and their grantors, for more than twenty years?

In considering this question it is important to keep in mind that the fee of said lands was in appellee; that appellee was holding it for the public; that appellee *is* so holding it, was simply a representative of the "sovereign,"—"the people."

It was a maxim of the old common law that no prescriptive right could be asserted against the King. In this country we find the maxim stated thus,—"No prescriptive right can be obtained against the Government."

In the case of Commonwealth v. Sisson, 189 Mass. 247, the Sissons were owners of a saw-mill, and discharged the sawdust therefrom into a certain named river. The fish and game commissioners of Mass., acting under authority of a statute, had ordered the Sissons to refrain from so discharging the sawdust, because the same was injurious to the fish in said river. They refused to comply with that order. An action having been brought against them they sought to defend on the ground of a prescriptive right. Upon the trial they requested the court to hold the law to be as follows,—

"That the defendants and their predecessors in title, having been discharging sawdust from their sawmills for more than twenty years consecutively, under a claim of right, into the Konapot River, have acquired by prescription, a title to such right, and such right is their property, of which they cannot be deprived without compensation."

Which request was by the trial court refused, and on appeal the Supreme Court in passing upon the question presented said,—

"The right to run a sawmill on the banks of a brook or river is like all rights of property, subject to be regulated by the Legislature when the unrestrained exercise of it conflicts with other rights public or private. The defendant's contention that they have a
56 prescriptive right to discharge sawdust into the river (even if it kills or injures the fish therein), which prescriptive right can not be taken away or impaired without compensation being made therefor, means this and nothing more: Where the Legislature up

he passage of the Act here in question, had not regulated the usiness of sawing wood on the banks of streams, having in them dible fish, and where, in the absence of such regulations, the defendant had discharged sawdust into the stream for thirty years, the eople have lost the power to regulate the conflicting rights of sawmills on the banks of the stream and to preserve the fish in the tream itself. The statement of the proposition is enough to show hat there is nothing in it."

Are appellants entitled to damages for the consequential damages hey have sustained?

In the City of Chicago v. Jackson, (Ill.) 63 N. E. 1013, which was an action by a property owner to recover damages alleged to have been sustained by reason of the depreciation of his property consequent upon the lowering of the grade of a street in the construction of a subway, it was said,—

"Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensibly styled 'Police Laws and Regulations'; and it is well settled that laws and regulations of this character, though they may destroy the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The safety of the people is the supreme object of the law." Dillon on Municipal Corporations, §212; Bancroft v. City of Cambridge, 126 Mass. 438.

In the case of the City of Chicago v. Rumsey, 87 Ill. 348, which was an action for damages alleged to have been sustained in consequence of a tunnel under the Chicago River in Lasalle Street, the court held that the fee in the soil of the street in the original town of Chicago, laid off by the Canal Commissioners, under the provisions of the law, was either in the State or in the City, for the use of the public generally and that it was competent for the
57 City under Legislative authority of the State, to construct a tunnel in the street, and if done in a proper manner and without unreasonable delay, no action would lie against the city in favor of an adjoining lot owner whose property had received no physical injury.

In the case of the Northern Transportation Co. v. The City of Chicago, 99 U. S. 635, 25 Law Ed. 336, which was an action for damage to property alleged to have been occasioned by reason of the construction of the La Salle Street tunnel under the Chicago River, the court said,—

"The case has been argued under the assumption that the erection of the coffer-dam, and the necessary excavations in the street, constituted a public nuisance, causing special damage to the plaintiffs

beyond those incident to the public at large; and hence, it is inferred the city is responsible to them for the injurious consequences resulting therefrom. The answer to this is that the assumption is unwarranted. *That can not be a nuisance, such as to give a common law right of action, which the law authorizes.* (Our italics.) We refer to an action at common law such as this is. A Legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case if the statute be such as the Legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it. If this were not so, the suffering party would be entitled to repeat actions until an abatement of the erections would be enforced, or perhaps *he* might restrain them by injunction.

"Here the tunnel of which the plaintiffs complain, or rather its construction, was authorized by an act of the Legislature of the State, and directed by an ordinance of the City Council. This we do not understand to be denied, and it certainly cannot be. The State, and the city council, as its agents, had full power over the highways of the city, to improve them for the uses for which they were made highways, and the construction of the tunnel was an exercise of that power. Since La Salle Street was extended across the river, the city council not only had the power but it was
58 its duty to provide for convenience of passage. This it could do either by the erection of a bridge, or by the construction of a tunnel under the river and along the line of the street. And the grant of power by the Legislature to build a bridge or construct a tunnel carried with it, of course, all that was necessary for the exercise of the power. We do not understand this to be controverted by the plaintiffs in error. Their argument is, that though the city had the legal right to construct the tunnel, and to do what was necessary for its construction, subject to the condition that in doing the work there should be no unnecessary interference with private property, yet it was liable to make compensation for the consequential damages caused to persons specially injured. To this we can not assent.

"It is immaterial whether the fee of the street was in the State or in the City or in the adjoining lot holders. If in the latter, the State had an easement to repair and improve the street over its entire length and breadth, to adapt it to easy and safe passage.

"It is undeniable that in making the improvement of which the plaintiffs complain the City was the agent of the State, and performing a public duty imposed upon it by the Legislature; and that person- appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, it is a doctrine almost universally *accepting* alike in England and in this country. (Citing Authorities.) * * *

"The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that and that only which the Legislature shall give. It does not exist at common law."

In Roberts v. Chicago, 26 Ill. 249, the action was for damages to property caused by raising the grade of the street in front of plaintiff's property, so as completely to block up and destroy access to his property, in consequence whereof, the plaintiff was put to
59 large expense in raising his building to the level of the street, and he was also alleged to have been otherwise injured. The court, in passing upon the question then before it said,—

"We recognize unhesitatingly as sound law, that the City has a right to establish and change the grade of the streets and to compel the owners of lots to grade the streets accordingly; * * * and when a grade is established or altered in good faith, with the purpose of improving the streets, the courts will not inquire whether it was the best grade which could have been adopted."

In the case of Commissioners of etc. v. Venard, 10 Kas. 95, the said Board of Commissioners, acting under statutory authority had entered an order vacating a portion of a certain highway. After said order had been entered the appellee filed a claim for damages to his real estate suffered because of such vacation. He obtained a verdict and judgment in the lower court and upon appeal, in passing upon the matter presented the court said,—

"The main question in this case and the only one which we think necessary to consider, is whether a county, when the commissioners thereof vacate a county road, is liable in damages to any person who may sustain some loss in consequence thereof. We think a county is not so liable. There is no statute that makes it liable, and we know of no principal of the common law that would create such liability. The county through its officers has an undoubted legal right to vacate county roads, and neither the county nor its officers commit any wrong by so doing; nor do they take any person's property; and therefore, if any consequential loss results to any individual it must be damnum absque injuria. Nor can it make any difference that the party claiming damages has some interest in the road different from that of the public in general. It requires more than a peculiar interest in a thing to entitle a party to maintain an action. It requires that the party against whom the action was prosecuted should have committed, or is about to commit some wrong. * * * Nor can it be claimed that the claimant in this

case, or any other person, has any vested right or interest in the road as a road. Because it has once been to the interest of the public to open up and travel on a particular road is no reason that the public should forever afterwards be compelled to travel on such road and pay the expenses of keeping it in repair, or else pay all
60 damages that might result to individuals by reason of its vacation."

In the case of Bradbury v. Walton, 94 Ky. 163, a certain public highway had been closed by order of the county court acting under statutory authority. The appellant claimed damages on account of such closing. It was urged that the statute was unconstitutional in that it authorized the taking of private property for public purposes without just compensation. In passing upon the matter then before it the court said,—

"The appellee closed the road on his own land and therefore no trespass was committed by an entry on appellant's land and unless the latter has some right of property in this easement not only on his own land but on the land of the appellee, no action can be maintained by reason of the wrong complained of.

"The public highways of the state known as county roads are open and maintained for the public and not for mere individual use, and whenever it may be deemed proper to close, alter, or discontinue a county road, the power is given to the county court to make such change as may be conducive to the public welfare, and the right to close a highway that affects the travel on a turnpike is expressly given the county court, to be exercised only when the public need requires it, and of this the county court must be the exclusive judge, and its action only subject to review by some higher tribunal. * * *

"A private citizen has no right of property in a public road although it passes over his own land, unless he owns the land itself subject to the easement. If the owner of land abutting on a public road has a right of property in the easement it necessarily follows that no change or alteration can be made without first making compensation to the owner, as it would be a taking of private property for public use without compensation; but he has no other interest such as is common to the entire public, and where he is the owner of the land and the road is discontinued its use then reverts to him to the extent he has title and no further. * * * The State creates the easement for the entire public; its use is that of the public, one citizen having as much right to its use as the other, and when its abandonment or non use is deemed necessary for the public good, the county court may discontinue it altogether and in that tribunal the question must be made."

In Lexington etc. R. Co. v. Applegate, 8 Dana (Ky.) 294,
61 the court said,—

"An ordinary public way may be discontinued or applied to some other public purpose than that for which it was first established

without any legal liability for pecuniary compensation to the local public or to any owner of adjoining land—because neither such public nor proprietor had any right of property in the way, or any other legal interest in it than that which was common to all the people."

In the case of Morris v. The City of Indianapolis, 177 Ind. 369, it was said,—

"The rule appears to be well settled that where work of public necessity and convenience has been performed within the limits of a public street of a city or town, through the properly constituted officials under statutory authority, and without negligence or lack of skill, no legal liability arises against the city or town in favor of an abutting property owner for consequential injury or damages sustained by him. This rule applies in full force in denying a right of action to a property owner for injuries or damages resulting on account of the alteration or change of the grade of the street or streets on which his property abuts. It is equally well settled by our own decisions, that such consequential injury does not come within the provisions of the State Constitution which prohibits the taking of private property for public use without compensation therefor being first assessed and tendered."

Applying the principles laid down in the foregoing cases to the facts in this case, as stated in said complaint, we must hold, that appellants did not have, as against the public authorities, any property right in and to said street and sidewalk, as a way of ingress and egress to and from this said property; that the damage suffered by them under the facts alleged, was simply consequential.

Counsel for appellants have cited numerous authorities as sustaining their contention that they had a property right in and to said street and sidewalk, as a way of ingress and egress to and from said property.

It is the law that every property owner has such right as against all private persons, or private corporations, and having such right, the authorities neither of city or state have any right to take such right of access from the owner of such property, and confer the same, or a superior right upon another. Therefore neither city
62 councils nor the Legislature, can take from the owner of a lot his way of egress, by authorizing a railroad company to lay its tracks, build a grade, or construct any structure for its advantage, which involves the taking of such property owner's right of access. All persons stand equal before the law. The cases relied upon by appellants involve taking of access to property, by railroads etc., and are therefore not in point.

The court did not err in sustaining said demurrer. The judgment is affirmed.

Remy, Batman & McMahan, JJ., concur.

Dausman, J. concurs in result. Nichols, P. J. dissents.

63 DAUSMAN, *P. J.*, concurs in result, with separate opinion in the words and figures following, to-wit:

I am of the opinion that the averments of the complaint show a taking of private property for a public use and that the plaintiff is entitled to the protection afforded by §21, Article 1, of the Constitution. It seems to me, however, that the plaintiff is not entitled to maintain an action against the Board of Commissioners for common law damages. It is well settled that a county is not a municipal corporation. A county is a territorial subdivision of the State. These territorial subdivisions have been devised for the purpose of aiding and facilitating the work of the state government. As part of the plan, the Constitution provides that in each county there shall be certain public officials who are commonly known as "county officers." §2, Article 6, Constitution. But in truth they are state officers who discharge certain governmental functions of and for the state within their respective territorial limits. On this basis it is held that the citizens (and their property) within a county are not liable for the misconduct of the so-called county officers, unless otherwise provided by legislation. Board etc. v. Allman, 142 Ind. 573; Smith v. Board etc., 131 Ind. 116; Morris v. Board etc., 131 Ind. 285; Board etc. v. Rickel, 106 Ind. 501. See House v. Board etc., 60 Ind. 580.

If the plaintiff had proceeded on the theory that the Board of Commissioners, in doing the public work described in the complaint, exceeded its power, or willfully or negligently destroyed his property, his action could not be maintained against the Board. The fact that the complaint proceeds on the theory that in doing the public work therein described, the Board of Commissioners acted within its powers, and that the taking of his property was incidental, can make no difference with respect to the plaintiff's assumed right to maintain this action.

Exactly what sort of entity is the Board of Commissioners? The confused state of the law makes it difficult, if not impossible, for one to conceive the precise legal status of that governmental agency. The Constitution refers to these boards as "the boards doing county business in the several counties," and places them under the general heading "Administrative." §10, Article 6, Constitution. The Legislature has declared that:

(1) "There shall be organized in each county in this state a board of commissioners for transacting county business,
64 * * *." §5969 Burns' Ann. St. 1914.

(2) "Such commissioners shall be considered a body corporate and politic by the name and style of 'The Board of Commissioners of the county of ——'; and as such, and in such name, may prosecute and defend suits, and have all other duties, rights and powers incident to corporations. * * *." §5974 Burns' Ann. St. 1914.

The Supreme Court has said that a Board of Commissioners is a court. Jay v. O'Donnell, 178 Ind. 282.

Whatever may be the legal status of the Board, the members thereof would not be liable to the plaintiff in their private capacity. A judgment against the Board in its corporate capacity would be of no value unless a way has been provided by legislation whereby a tax may be levied on the property of the citizens within the county for the purpose of raising a fund to discharge the judgment. If the Legislature has provided any method by which the plaintiff may recover for the taking of his property, it must be by way of an assessment of damages. §939 Burns' Ann. St. 1914. I am of the opinion that he may have his loss appraised pursuant to the statute of which said section is a part, and then file with the Board a claim based on the amount thus determined. In the absence of more specific legislation this statute should be liberally construed; and when so construed, it will furnish the plaintiff an ample remedy.

Having mistaken his remedy, I am of the opinion that the plaintiff was not injured by the ruling on the demurrer; and therefore I concur in the result reached by the majority of my brothers of this court; but I am unable to concur in the reasoning by which that result has been reached.

65 Nichols, P. J. dissents with opinion in the words and figures following, to-wit:

The conclusion reached by the majority of the court, in my view, results in such rank injustice to appellants, and is so subversive of the private rights of a citizen of the State, and is so contrary to the plain unequivocal declaration of the Constitution of the State, and of American Constitution generally, that I must enter an emphatic protest to such conclusion.

The majority opinion holds, in effect, in harmony with appellee's contention, that the facts as averred in the complaint present a case simply of a change in the grade of a street with consequential damages, and that such change though it interfere with, or deprive appellants of their ingress and egress to their property, or though it results as averred, in a total destruction of appellants' abutting property, is not a taking thereof for which they are entitled to compensation; that the principle involved is the same as in the case of Morris vs. City of Indianapolis, 177 Ind. 369, 94 N. E. 705, and that therefore we cannot reverse this case without overruling the Morris case. Of course, this court will hardly presume to overrule the Supreme Court, but we do not need to do so in order fully to meet appellee's contention. That case, which is the only Indiana Case cited in the majority opinion, involved only the alteration or change of the grade of a street, and in such a case it has been repeatedly held in this State that there can be no compensation for damages, and appellants make no contention to the contrary. It has been held, however, that if in grading a street the lateral support to abutting land is removed, the owner may have damages. O'Brien vs. St. Paul, 25 Minn. 331; Buskirk vs. Strickland, 47 Mich. 389; Richardson vs. Vt. Cent. R. R. Co., 25 Vt. 465. Appellants do not contend that the work done by appellee which resulted in the damages com-

plained of was without authority of law. But appellants do claim that they are entitled to compensation for the damages they have suffered, which by the allegations of the complaint, admitted for the purposes of demurrer, were $12,000. This contention, as I view the case, is not without merit.

As it seems to me, the majority of the court stumble when they undertake to make a distinction between the rights of an abutting property owner when the public has only an easement in a highway or street, and when the title to such highway or street is a fee simple in the public.

66 In cases like the one at bar, where the private rights of the abutting property owner have been invaded, where his property has been destroyed, and where, though it were not destroyed, his right of ingress and egress has been destroyed, his recovery must be the same whether the public holds only an easement in the highway or street, or whether the public is vested with the fee simple.

In the case of Adams vs. Chicago R. R. Co., 39 Minn. 286, it was held that it makes no difference that the fee is not in the abutter, he has, independent of the ownership of the soil, an interest in the street appurtenant to his lot. That although the fee of the street be in the State or municipality, the owner of an abutting lot has, as appurtenant to his lot, an interest or easement in the street in front of it, which is entirely distinct from the interest of the public. The authority quotes with approval from Grand Rapids Etc., Co., vs. Heisel, 38 Mich. 62, as follows: "Every lot owner has a peculiar interest in the adjacent street which neither the local nor the general public can pretend to claim; a private right in the nature of an incorporeal hereditament, legally attached to his contiguous ground; an incidental title to certain facilities and franchises, which is in the nature of a property and which can no more be appropriated against his will than any tangible property of which he may be the owner." After directing attention to the Elevated Ry. Cases and citing Story vs. N. Y. Elev. Ry. Co., 90 N. Y. 122, and Lahr vs. Metropolitan Elev. Ry. Co., 104 N. Y. 268, 10 N. E. 528, the court says: "We think that in those cases the doctrine is unqualifiedly established that—no matter who may own the fee, an abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property." In the Lahr case cited above, the spirit of the court in dealing with the question may be better understood when we note that it held that if the rights of an abutting owner may be taken from him without his consent, or without compensation, "a system has been inaugurated which resembles more nearly legalized robbery, than any other form of acquiring property."

67 In Theobold vs. L. N. O. & T. Ry. Co., 86 Miss. 279, 288, the court says: "Whether the abutting owner has simply an easement in the street, while the fee is in the public, or in some other

owner, or whether he has both the fee and an easement, he is equally entitled to require that nothing shall be done in derogation of his rights."

In the case of Cin. etc. Street Ry. Co. vs. Cummingsville, 14 Ohio St. 541, which involved the rights of abutting property owners in and to the adjacent street, the court says: "For this purpose, there is no occasion to distinguish between lands acquired for ordinary highways, leaving the fee in the owner, and lands dedicated for streets in towns, where the fee vests in the municipal corporation, in trust to answer the purposes of the use. In either case, the interest acquired and used by the public at large, is an easement of a definite character and held for the attainment of known objects, and in either case, distinct from the right of the public to the use of the street, is the right and interest of the owners of lots adjacent." To the same effect, see Railway Co. vs. Lawrence, 38 Ohio St. 41; Crawford v. Delaware, 7 Ohio St. 459, 469. But we do not need to look further, for our own state settled this question long ago in the case of Haynes vs. Thomas, 7 Ind. 38. The dedication there involved was under the Act of 1818, in the Revision of 1831, p. 530, which provided that all donations or grants marked and noted as such on the plat of the town wherein such donations or grants are made, shall be considered to all intents and purposes as general warranties, and it was held in that case that the right to use the street in a town, adjoining a lot abutting upon it, is as much property as the lot itself, and the legislature has as little power to take one away as the other, and that whether the act of dedication transfers the fee from the donor to the public, is not a material inquiry.

Another principle is just as effective to preserve appellants' rights as the one which we have just discussed. It will be observed from the statement of facts in the majority opinion that appellee was the owner of 22½ feet in front of appellants' lots, and that it sold this tract of land to appellants' remote grantor. It will hardly be denied, whatever may be the nature of the title that appellee holds in the highway in front of appellants' property, that it had fully dedicated the same to the public for the use of a highway, and that such dedication preceded the time of the conveyance of the 22½ feet to appellants' remote grantor. It was held in Messick vs. Kincade, 147 Ky. 680, 145 S. W. 375, that a purchaser of lots on the faith of the vendor's dedication of the street in front of them could use to prevent the vendor from obstructing the street. And again, in City of Macon vs. Franklin, 72 Ga. 239, it was held that where a municipal corporation makes a valid dedication of land belonging to it, the dedication not only inures to the benefit of those who were purchasers before or at the time when the dedication was made, but, when made, it is for the benefit as well of all who become citizens subsequently, so that the latter may resist its revocation by such corporation, and it is an appropriation for public use forever, and all who may become members of that public are its beneficiaries, and have rights in the use which the law will protect.

In Cook vs. City of Burlington, 30 Iowa, 94, 6 Amr. R. 549, it was held that where Congress dedicated lands to public use, subse-

quent purchasers of lots abutting thereon possessed such an interest therein as to be entitled to an injunction against an absolute conveyance of the property for private purposes by the holder of the legal title.

In Harmony with this principle, it has been held that by deeding lots with reference to a plan recorded by its predecessor, defendant represented that the ways shown by the plan existed, and the purchaser can enjoin incumbrance of such ways to his prejudice. Douglas vs. Balknap Springs Land Co., 76 N. H. 254, 37 L. R. A. (N. S.) 953, 81 Atl. 1086.

It would be a strange doctrine indeed that would permit a grantor, whether a public or a private holder, to convey real estate abutting upon a highway, which location must of necessity enhance its value, by giving to its grantee the means of ingress and egress to his property, and thereafter the same grantor could by his own act ruthlessly destroy such ingress and egress without compensation to the grantee.

69 Appellant's property, of the value aforesaid, consisted of lots abutting on the abutment and levee or approach to the bridge, which was a highway, and public street in the town of West La Fayette, and which lots had been raised to the grade of such highway and street and valuable buildings erected thereon. There was nothing at the time of such erection, or thereafter until the unprecedented flood in March, 1913, that suggested that there would be any change in such abutment and levee. After such unprecedented flood the appellee concluded to widen the throat of the bridge over the river, and to that end, by contract, caused the abutment, and the levee in front of appellants' property to be removed. Appellee caused an excavation to a depth of fifty feet to be made immediately in front of and next to appellants' property, thereby leaving appellants' lot without support, and the soil and dirt thereof caved into the excavation. From a new abutment which was constructed 170 feet further west, a new bridge was built over the excavation made, which bridge instead of being of the width of eighty feet which was the width of the old levee which constituted the highway, was but fifty six feet wide, thereby leaving an air space of twelve feet between the bridge and appellants' lots. The bridge was nine feet higher than the old levee with a banister four feet high on each side, made of concrete and stone. It will be seen from this that appellants' lots, from which there was free ingress and egress before the new bridge was constructed, was thereafter absolutely cut off from any ingress or egress. The waters of the river, having free access under said new bridge are turned against and over appellants' lots carrying thereon vast quantities of sand, earth, and debris, and carrying away the soil. We cannot imagine a more complete destruction of property rights. Who desires the task of going into the presence of this wreck and ruin, which under the opinion of the majority of the court might as well have been appellants' castle, their home, as their place of business, and, with the majority opinion as a text, of undertaking to demonstrate to appellants the beauties of American Constitutions in

their protection of the private rights of the citizen, as contrasted with the "rights of the king" of former days?

70 Section 21 of the Constitution of Indiana, being §66, Burns R. S. 1914, provides that no man's property shall be taken without just compensation. This provision is for the protection of the citizen and should have a liberal construction to that end. The Supreme Court of this State, in the case of School Corporation vs. Heiney, 178 Ind. 1, 98 N. E. 628, opinion by Myers J.—has defined a taking of property within the constitutional provisions to be "an actual interference with or disturbance of property rights, which are not merely consequential, or incidental injuries to property, or property rights, as distinguished from prohibition of use, or enjoyment, or destruction of interests in property." After citing authorities, the Supreme Court says: "It seems axiomatic in that, if property may not be physically taken without just compensation under due process of law, one cannot be deprived of its use or enjoyment for that is in effect a taking." Appellants, as owners of the abutting lots, had a peculiar and distinct interest in the easement of the highway or street in front thereof, which is distinguished from the interest of the general public, in that it becomes an interest adhering to the contiguous grounds and buildings thereon, affording convenient access for their use. This interest in the street because of appellants' lots and buildings adjusted thereto as the street then existed, was a valuable right recognized by the law, and which cannot be taken without just compensation. The Town of Rensselaer vs. Leopold, 106 Ind. 29.

In Haslett vs. The New Albany, etc., R. R. Co., 7 Ind. App. 697, it was held that the owner of a lot abutting on a street in a town or city has a distinct and separate interest from the public in the easement of the street, in that his rights and interests are legally inherent in the lot itself, affording him the free and convenient use thereof. This property right cannot be taken from him or even impaired, without compensation. Numerous authorities are cited.

In Trotzman vs. Indpls., etc. R. R. Co., 9 Ind. 467, it was held that the right to use and enjoy the street is an appurtenance to the lot abutting upon the street, and any injury to the appurtenance is an injury to the whole property. The court citing Haynes vs.

71 Thomas, 7 Ind. 38, says: "It is decided that the right of the owner of a town lot abutting upon the street to use the street is as much property as the lot itself; that it is appurtenant to the lot, and is protected by the constitution. It cannot be taken away without compensation. The lot and street adjoining, then, as to the owner of the former, would seem to constitute but one piece of property, and an injury to the latter would seem to be an injury to the former—to the whole property."

In O'Brien vs. Central etc. Co., 15 Ind. 218, 63 N. E. 302, the action was for damages for the obstruction of a street. The lower court had sustained a demurrer to the complaint for damages, and the Supreme Court, reversing the lower court, says: "The abutter * * * has an individual property right, appendant to his premises, in that part of the street which is necessary to free and

convenient egrees and ingress to his property. That this latter right is private and personal, and unshared by the community, and cannot be taken away, or materially interfered with, without the wrongdoer being answerable in damages, had been many times declared by this court." Many authorities are cited. It is not contended that appellee was a wrongdoer, but the principle as to compensation is the same. The street or highway had been just as effectually obstructed, and appellants' egress and ingress just as effectually cut off, as if there had been a vacation of the street. There was a complete abandonment of the highway so far as appellants were concerned, and this together with the destruction of their property, amounted to a taking of the same, under the authorities above cited.

In Indpls. etc., Co., vs. Smith, 52 Ind. 428, it was held that the railroad company is liable in damages for injury occasioned by reason of the construction of a raised railroad track along the street of the city, thereby causing the water from the rains and freshets to flow upon adjacent real estate; and also for injury occasioned by reason of the construction of an embankment on a street approaching a street crossing of said track, in front of a lot in a city occupied by a dwelling house, thereby rendering the approach to the lot in front of such street impossible for carriages, wagons and vehicles and inconvenient for foot passengers.

72 The case of Dantzer vs. Indpls., etc. R. R. Co., 141 Ind. 604, is in harmony with the principle here announced, though deciding against the property owner who had sued for injunction. It is there stated that "The property rights of the property owner are coterminus with the lines of his lot, but that property rights may be obstructed and its uses defeated by cutting off ingress and egress to and from such lines from points upon the street beyond such lines. In such case there should be a remedy." The relief there sought was by injunction, but the court held that there was a remedy at law. Certainly, then, there should be a remedy for cutting off egress and ingress immediately at such property lines.

In the case of Oler vs. Pittsburg etc. R. R. Co., 184 Ind 431, 111 N. E. 618, citing with approval Haynes vs. Thomas, 7 Ind. 38, it was held that the private right of egress and ingress, of an abutter was one which the legislature itself could not take away, and with it take away the right to compensation for the deprivation.

Other authorities discuss the principle, many of which are cited from the above authorities. I deem it sufficient in reaching the conclusion as to this principle to which I must come, to consider only Indiana Authorities. But the principle as declared in Indiana is in harmony with the great weight of authorities in the other states.

In 20 C. J. § 156, the general principle is stated thus: "While the owner of a lot abutting on a public street has the same right to the use of the street that rests in the public, he at the same time has other rights which are special and peculiar to him, and the right of ingress and egress is one of them. The right of access is appurtenant to his lot and is private property; to destroy that right is to damage his property, and when this is done for the public good,

just compensation must be made therefor. When, there for, a person owns a lot which abuts upon a portion of a street which is vacated, so that access to the lot is shut off, he is entitled to compensation." Many authorities are cited sustaining the foregoing principle.

In Hooker vs. New Haven & Northampton Co., 14 Conn. 146, 15 Conn. 312, it is held that if a public work is of a character necessarily to disturb the occupation and enjoyment of his estate,
73 by one whose land is not taken, he may have an action on the case for such injury notwithstanding the statute makes no provision.

In Riordan vs. San Francisco, 66 Calif. 492, it was held that the word "damaged" embraces more than physical invasions of property. It is not restricted to cases where the owner is entitled to recover as for a tort at common law. The language is intended to cover all cases even those in which in the proper execution of a public work or purpose, the right or property of any person in a pecuniary way may be injuriously effected.

It will be observed that many cases from the Supreme Court of the State of Illinois are cited and discussed in the majority opinion. We do not find it necessary to review each of these cases, but only to cite from that state cases which are directly in point with the case at bar.

In Rigney vs. City of Chicago, 102 Ill. 64, it was held that where a city constructed a viaduct or bridge on a public street, near its intersection with another street, thereby cutting off access to the first named street from the plaintiff's house and lot, over and along the street intersected, except the means of a pair of stairs whereby the plaintiff's premises fronting on the latter street and near the obstruction were permanently damaged and depreciated in value by reason of being deprived of such access, it was held that the city was liable to the plaintiff in damages for the injury. Dickey C. J., in a concurring opinion says: "It is not every change in grade made in a street which may in effect impair the value of the lot in its vicinity, which is a violation of a right of a proprietor thereof. Such changes in a street as it may reasonably be supposed might be made for the improvement of a public highway, the purchaser of a lot upon the street must be assumed to have consented to when the purchase was made. The making of such changes is not therefore, an invasion of his right in that regard. But it cannot be assumed that the purchaser gave his assent to sudden and extraordinary changes in the grade of a public highway such as it is unreasonable to suppose the purchaser at the time of the original sale, or when he made improvements would naturally anticipate might be required for the improvement of the public highway. To make such changes
is an invasion of the right of the lot owner, and is the exer-
74 cise of a power under this right in the nature of the easement spoken of, and if the value of the property and the property is really impaired thereby, in such case the injury of the lot is, the damage which under our constitution must be compensated."

In Nevins vs. Peoria, 41 Ill. 502, it is held that "if it becomes necessary for the interest of the public, in grading or draining streets, that the lot of an individual should be rendered unfit for occupancy, either wholly or in part, the public should pay for it to the extent to which the owner is deprived of its legitimate use. Private property shall not be taken for public use without due compensation, applies as well to secure the payment for property partially taken for the use or convenience of a street, as where wholly taken and converted into a street. The question as to the extent to which the property is taken makes no difference in the application of the rule; private rights are never to be sacrificed to public convenience or necessity without full compensation, and for such an injury inflicted, an action may be maintained and damages recovered as compensation." See also City of Pekin vs. Brereton, 67 Ill. 477; City of Pekin vs. Winkel, 77 Ill. 56; City of Elgin vs. Eaton, 83 Ill. 535; Stack vs. City of East St. Louis, 85 Ill. 377.

In the case of City of Chicago vs. Taylor, 125 U. S. 161, 31 L. Ed. 638, the court cited with approval the case of Rigney vs. City of Chicago, 102 Ill. 64, and held that under the constitution of that state it is not necessary that the damage should be caused by trespass or an actual physical invasion of the owner's real estate, if the construction and operation of the railroad or other improvement is the cause of the damage, though consequentially.

The majority opinion relies in part for the conclusion which it has reached upon the case of Bradbury vs. Walker, 94 Ky. 163. This case involved the question of the vacation of a county public highway that was lateral to a turnpike and by the statute of that state was discontinued. We do not need to discuss the merits of this case for an examination discloses that it is not in point. It must be kept in mind that in the case at bar we are dealing with lots that were abutting upon a public highway that was a street. In the Bradbury case from which the majority opinion has quoted
75 so extensively we quote this principle of law: "Streets of a town or city are acquired by grant with the implied right of ingress and egress to the abutting lot owner, the grantor, or the party making the dedication, saying to the owners of the lots: 'This right of ingress and egress you shall have.'" This principle was early declared by the courts of Kentucky to be the fundamental law of that commonwealth.

In the case of Transylvania University vs. City of Lexington, 3 B. Munroe (1842) the court on p. 27, says: "Every owner of ground on any street in Lexington, has the right, as inviolable as it is indispensable, to the common and unobstructed use of the contiguous highway, so far as it may be necessary for affording him certain incidental easements and services, and a convenient outlet to other streets. And of this right, the legislature cannot deprive him, without his consent or just compensation in money. The extent of this appurtenant right, depending on circumstances, may not, in the particular case, be easily definable with mathematical precision. So far as it extends, however, it partakes of the character of private property, and is therefore protected by the fundamental law, as

property." This principle is sustained in the case of Gargan vs. Louisville, etc. R. R. Co., 89 Ky. 212, where it was held that when the closing up of one end of a street or alley leaves to the owner of property bordering upon the street or alley no convenient or reasonable means of access to other streets to which he has theretofore had convenient access, he is entitled to his action for damages, and that the city cannot either for its own use, or for the use of a private corporation appropriate the street to the injury of the property holder without making just compensation. The Transylvania case above quoted is cited with approval in the case of Illinois, etc., R. R. Co., vs. Elliott, 129 Ky. 121, 128, and Henderson vs. City of Lexington, 132 Ky. 390, 409. On the principle here involved the heart of the Kentucky court is right, and is in harmony with the principle announced in Elliott on Roads and Streets, §488, where the author says: "Individual owners of abutting property have a private interest in the highway distinct from the public of which they cannot be deprived by any use that destroys the character of the road or street as a way for free and unobstructed passage. To sustain this
76 principle so stated the author cites Cummins vs. City of Seymour, 79 Ind. 491, where the court on p. 501 says: "It is well settled that where one does sustain a special injury different in character from that sustained by the public he may have his action, citing Ross vs. Thompson, 78 Ind. 90.

In the case of Pumpelly vs. Green Bay Company, 13 Wallace 166, from the Supreme Court of the United States, where the court in discussing a like constitutional provision of the state of Wisconsin to the one here involved, with interpretation that protects the citizen's private rights, says: "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government from the absolute conversion of real property to the use of the public, it can destroy its value entirely, can inflict irreparable, and permanent injury to any extent, can, in effect, subject it to a total destruction without making any compensation, because, in the narrowest sense, of the word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at common law, instead of the government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

It is argued that the action of appellee in widening the throat of the bridge was an exercise of the police power, and that therefore there can be no recovery for the loss sustained, in other words, that such an injury is damnum absqu- injuria; but this argument cannot prevail.

77 In 20 C. J. §152, it is stated as a general principle that any occupation or use of a street or highway which obstructs the same so as to destroy or materially impair the easements of an abutting owner is a taking of, or injury to, private property entitling such owner to compensation, although such occupation or use is authorized by the legislature or the municipal authorities, or the obstruction is erected by the City in the exercise of its police power." This principle is there sustained by many authorities.

Again, it is stated in Dillon on Municipal Corporations, 4 Ed. §303, as follows: "All-embracing and penetrating as the police power of the State is, and of necessity must be, it is nevertheless subject, like all other legislative powers, to the paramount authority of the State and Federal Constitutions. A right conferred or protected by the Constitution cannot be overthrown or impair-d by any authority derived from police power."

The principle is illustrated by the case of City of Chicago vs. Le Moine, 119 Fed. R. 662, which was a case involving the construction of a viaduct in a street, and the court held that "the contention that the construction of the viaduct was in the legitimate exercise of the police power of the City, and that any damage to property thereby occasioned is damnum absque injuria, notwithstanding the constitutional provision that 'private property shall not be taken or damaged for public use without just compensation' cannot be sustained. The question is set at rest by the recent decision of the Supreme Court of Illinois in City of Chicago vs. Jackson 63 N. E. 1013, holding with Judge Dillon, that 'the right conferred or protected by the Constitution cannot be overthrown or impaired by any authority derived from the police power'."

In re: Cheeseborough, 78 N. Y. 232, 237, it is said that "the interference with property under the police power may be justified in most cases by the application of the principle that one shall so use his own property, as not to injure or endanger the property or health, or disturb unnecessarily the peace and comfort of his neighbor. But there never can be any necessity under the police power or the law of necessity to permanently appropriate land to the public use without compensation."

78 When I consider that along with the destruction of the means of ingress and egress there was in this case a destruction of the property from which there had been an ingress and egress, thereby totally annihilating appellants' property rights, I must say that it would be strange reasoning indeed that would undertake to justify such an invasion without compensation by the government, of the private rights of one of its citizens, even though such an invasion be in the exercise of police power.

I have already quoted from Pumpelly vs. Green Bay, etc. Co., 13 Wallace, 166, but before closing this dissenting opinion I must again advert to that opinion. On p. 180, Miller, C. J., says: "We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of im-

provements of roads, street, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decision of the courts of those States. But we are of the opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

I am pleased to declare myself in harmony with this clear expression of judicial acumen, and for the purposes of this opinion to emphasize that part of it that opines that the decisions holding no redress, have gone to the uttermost limit of sound judicial construction in favor of the principle, and to assert that the majority opinion in this case is among the cases that have gone be-
79 yond it.

These are troublous times, when enemies from without and from within, taking advantage of the turmoil of war and its aftermath, would strike down our American Constitutions, both Federal and State, days so ominous that those who fought to save our country from the hand of the aggressor and to vindicate its honor, have deemed it imperative that they organize to preach Americanism and the supremacy of Constitutional law. But they must be hindered in their patriotic efforts, if, while they proclaim American liberty and rights, the courts by judicial mis-interpretation of constitutional rights, take from the private citizen his property, without due process and compensation,—in this case of the value of $12,000, and for aught that appears, their all. With equal plausibility, the citizen's liberty or life may be taken.

Under the facts in this case, and in view of the plain provisions of the Constitution, I must stand for the constitutional rights of the private citizen and I, therefore, dissent from the majority opinion.

The demurrers to the respective paragraphs of complaint should be overruled.

It is therefore considered by the court that the judgment of the court below be affirmed at the cost of the appellants.

And it is further considered and adjudged by the court that the appellee recover of the appellants the sum of $— for its costs in this behalf expended.

80 And afterwards, towit: On the 9th of August, 1921, the same being the 68th Judicial day of the May Term 1921, of

said Appellate Court, the following further pleas and proceedings were had herein:

Come now the appellants by counsel and file their petition and briefs (8) for a rehearing herein, which petition is in the words and figures following:

In the Appellate Court of the State of Indiana.

No. 10523.

WILLIAM RANDALL et al., Appellants,

vs.

BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA.

Petition for Rehearing.

The appellants respectfully petition the Court to grant a rehearing in the above entitled cause for each of the reasons herein stated, that the court erred in its decision and opinion in said cause, as follows, towit:

1. The court erred in holding that by and under the deed executed by the appellee, conveying the twenty-two and one half foot strip of land along the north end of the appellants' property, nor their remote grantors acquired any reversionary right to the fee of said highway, nor any special interest therein.

2. The Court erred in holding that the appellants herein, did not acquire any special interest or easement to the embankment and highway along appellants' property by reason of an uninterrupted use of the same, as a way of egress and ingress to their property, by themselves and their remote grantees for more than twenty years.

3. The Court erred in holding that appellants did not have as against the public authorities any property right in and to said street and sidewalk along appellants' property, as a way of egress and ingress from said property.

81 4. The Court erred in holding that the damage suffered by appellants herein, under the facts alleged by the amended complaint was simply consequential.

5. The Court erred in holding that the appellant had no property right of access from the owner of such property and confer the same, as a way of ingress and egress to and from said property.

6. The Court erred in finding that the rule that every property owner has such right of ingress and egress to property as against all private persons or private corporations, and having such right, the authorities, neither of the city or state have any right to take such right of access from the owner of such property and confer the same, or a superior right upon another does not apply to public corporations and municipalities.

7. The Court erred in holding that the facts alleged in appellants' amended complaint herein, does not constitute a taking of property within section 21 of the constitution of the state of Indiana, being section 66 of Burns' 1914 Revised Statutes of Indiana.

8. The Court erred in holding that the facts alleged in the appellants' amended complaint does not constitute a taking of property for public uses without just compensation, for the reason the same is in direct contravention of the 21st section of the Bill of Rights of the State of Indiana.

9. The Court erred in holding that the demurrer should be sustained.

Wherefore, the appellants pray for a rehearing on the within petition for each and singular of the reasons herein set forth.

CHARLES M. SNYDER,
MORRIS R. PARKS,
GEORGE D. PARKS,
WILBUR G. NOLIN,
Attorneys for the Appellants.

82 (Endorsed:) No. 10623. State of Indiana. In the Appellate Court. William Randall, et al., Appellants, vs. Board of Commissioners of Tippecanoe County, Indiana, Appellee. Petition for rehearing. Charles N. Snyder. Morris R. Parks. George D. Parks. Wilbur G. Nolin. Attorneys for appellants. Filed Aug. 9, 1921. Patrick J. Lynch, Clerk. 10 3 21. Petition denied.

And afterwards, towit: On the 4th of October, 1921, the same being the 116th Judicial day of the May Term 1921 of said Appellate Court the following further pleas and proceedings were had in said cause, towit:

Come now the parties by counsel and the court being fully advised in the premises, denies appellants' petition for rehearing in the above entitled cause.

And afterwards, towit: On the 3rd of November, 1921, the same being the 142nd Judicial day of the May Term 1921 of said Appellate Court, the following further pleas and proceedings were had in said cause, towit:

Come now the appellants by counsel and file Motion and briefs (8) to vacate the Order of July 22, 1919, Transferring the Cause to the Appellate Court, or in the Alternative for a Writ of Error Coram Nobis in the words and figures following, towit:

83 STATE OF INDIANA:

In the Supreme Court.

(No. 23567.) #10623.

WILLIAM RANDALL et al., Appellants,

vs.

BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA, Appellee.

Motion to Vacate the Order of July 22, 1919, Transferring the Cause to the Appellate Court or, in the Alternative, for a Writ of Error Coram Nobis.

Comes now the appellants in the above entitled cause and move the court to vacate the order heretofore entered herein on the 22d day of July, 1919, transferring the above-entitled cause to the Appellate Court, and for ground thereof shows—

1. That the question then presented to the Court by the appellant's brief was one primarily arising under the Constitution of the State of Indiana, to wit: Section 21 of Article 1—

"No man's property shall be taken by law, without just compensation, nor except in the case of the State without such compensation first assessed and tendered."

See appellant's brief, Points and Authorities, p. 23.

2. That appellants' complaint predicated their right to recover, under the aforesaid section of the Indiana Constitution, that an appeal was prayed and allowed to this Honorable Court by an able and experienced trial judge, and that after appellants' brief was filed this Honorable Court inadvertently ordered the cause transferred, because the counsel for the appellee, in asking for time, stated the action was for damages without stating that the claim thereto was based on the aforesaid section of the Constitution—

And that finally the question presented by the briefs by both appellant and appellee and by the opinion of the Appellate Court concurring and dissenting was primarily a question of constitutional law arising under Sections 12 and 21 of Article 1 of the Constitution of Indiana and the second clause of the first section of the 14th amendment to the Constitution of the United States.

Ex parte Franc, 176 Ind. 72.

84 On Page 93 thereof this court says in quoting another court.

"It was there said that the constitutional courts are designed to secure the citizen his rights and to enforce the observance of constitutional limitations."

3. As appears by the opinion of the Appellate Court, one of the questions in issue was whether the fee to the ground underneath the embankment or causeway or bridge was in the appellants or appellees. So the title to real estate was in issue.

4. The right to ingress or egress, even if the title to the land underneath the embankment of the bridge was in the appellee, was an incorporeal hereditament and is real estate and therefore the title to real estate is in issue.

5. The appellees in their brief make the point that the constitution of Indiana, Section 21 of Article 1, is different from the constitutions of most states in that it does not provide that a land owner or abutting property owner may recover consequential damages no matter how great those damages may be by reason of a municipality interfering with the enjoyment of his property by reason of a change in the location or change in the grade of the street. This brings up the question whether or not as presented by the dissenting opinion of Judge Nichols that the constitutional provision of Indiana is not in violation of the second clause of the first section of the 14th Amendment to the Constitution, which provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

6. This section of the 14th Amendment was adopted for the very purpose of correcting injustice such as counsel point out prevails in the Indiana constitution as well as its laws, and the constitution and laws of other states at the time of the adoption of the 14th Amendment.

Wherefore these appellants charge that Section 21 of Article 1 of the Constitution of the State of Indiana is in violation of Section 2, Clause 1, of the 14th Amendment of the Constitution of the United States in that it provides as construed by the Appellate Court
85 in this case, that the plaintiff's property may be damaged or taken without due process of law.

7. Appellants say that the judgment of affirmance of Appellate Court in the above entitled cause is contrary to the second clause of Section 1 of the 14th Amendment in that it operates to deprive the appellants of a privilege long enjoyed by them, namely: that of free ingress and egress to and from their property or buildings and the embankment constituting the street or highway and being the continuation of Third Street of the city of La Fayette, Ind.

8. The concurring opinion of Judge Dausman is devoted to the constitutional powers and duties of County Commissioner, and although it is provided by law that they are a corporation and may sue and be sued, and it is provided in the contract for the construc-

tion of the bridge in place of the embankment, that they, and not the contractor shall be liable for the damages which it is evident from their notice to appellants they contemplated would result from the proposed undermining of appellant's building, and which his Honor says is a very great damage, $12,000.00 in amount, yet his Honor concludes that appellant cannot sue because the State is sovereign and the County Commissioners are an agency of the State.

The answer to his Honor is the contract of the Commissioners to assume the damages, and Sections 21 providing for damages and Section 12 the remedy. If the State fails to assess the damages in the first instance of the avowed purpose to inflict an injury on the property holder (see the complaint, Appellant's Brief, pages 6 and 7), the property owner may have his action under Section 12 of the Bill of Rights. It is self-executing in the Courts.

But however this may be the order of July 2, 1919, and the third section of Section 1394, and the fourteenth section of Section 1392 of Burns' Statutes 1914 are unconstitutional under the equal protection clause of the 14th Amendment, in that they allow a review by this Court or a transfer to this Court in a case where there is damages which are assessed by way of a judgment amount to more than $6,000.00, but allow no review or transfer to this court, where the damages are avowed to be of the same or a greater amount but there is no judgment. The party whose property is damaged is not allowed an appeal or transfer while the party who does the damage is allowed an appeal or transfer to this Court.

86 Indeed, we may go Bolshevic by an abuse of the taxing power or the police power, but can this or any Court say to do so is not in violation of the provisions of the constitution.

The case in 13th Wallace to which Judge Nichols refers was before the 14th Amendment and even then compensation was allowed.

The first case under that amendment was the Slaugh-er House cases, 16 Wallace 36. Read that case and then conclude, if this Honorable Court can, that there is no constitutional question here.

While relief was not granted in the Slaughter House case as prayed—it being a 5 to 4 decision with Justice Bradley dissenting—in the Civil Rights Case 109 U. S. 3, Justice Bradley in writing the opinion of the Court upholds his views in the Slaughter House cases viz., page 23.

"Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law."

All that is necessary to invoke the constitutional question under the Fourteenth Amendment is to show that the alleged wrong and injury is done by virtue of or under color of some state agency, legislative, executive or judicial.

As Judge Nichols says, he cannot overrule the Supreme Court, but he can and does point out that if the Morris case operates as his brethren construes it—erroneously as we believe—it conflicts not only

with the Indiana constitution provisions above mentioned, but also the second clause of the Fourteenth Amendment of the Constitution of the United States.

Judge Nichols certainly raises a constitutional question.

9. And appellants say that having properly perfected their appeal to this Honorable Court, according to law, they can in no wise now be debarred, estopped and denied their right to have their said cause reviewed, which they now demand as a constitutional right to enforce a constitutional guaranty, because of any mistake or action of this Honorable Court.

Section 4, Article 7, of the Constitution of Indiana. Chapman v. Wintrooth, 252 U. S. 126, at pp. 136 and 137.

87 If section 1 of the Act of 1852 abolishing writ of error is valid, which we deny—for it is not in the power of the legislature to abolish any right granted to a citizen by the Constitution—then this court must set aside the order of transfer herein and decide the constitutional question presented by the brief of appellants and appellee herein.

As was said by the Supreme Court of the United States in Virginia v. Rives, 100 U. S. 313, p. 319, it was a case of a violation of the constitutional provision after getting into the trial in the Appellate Court.

If the constitutional question only arose in the Appellate Court—and it was certainly up there—there is no other method than the motion herein made—if the motion to transfer fails—to invoke the appellate jurisdiction of this court.

The writ of coram nobis is in force in this State.

Saunders v. State, 85 Ind. 318.

On page 326 this court quotes from Freeman Judgments.

"The writ of error coram nobis is not intended to authorize any court to revise its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment.

To the end that if this court may be of the opinion that the motion to vacate the order of July 22, 1919, come too late the appellant pray in the alternative that this motion may be treated as a petition for a writ of coram nobis directed to the clerk of the Appellate Court to transfer the record briefs and all papers in said cause No. 10623 and for right and justice in the premises.

Respectfully submitted. OTTO GRESHAM,
Attorney for Appellant.

88 And on the same day the following further pleas and proceedings were had in said cause, to wit:

Come now the appellants by counsel and file petition to transfer the above-entitled cause to the Supreme Court and brief (8) in the words and figures following, to wit:

STATE OF INDIANA:

In the Supreme Court.

No. 10623.

WILLIAM RANDALL et al., Appellants,

vs.

BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA, Appellee.

Appellants' Petition to Transfer.

The appellants in the above entitled cause show to the Court th the judgment in the Tippecanoe Circuit Court in this cause w affirmed by the full bench of the Appellate Court on the 10th day June, 1921, and that written opinions were then filed.

The hearing in the Circuit Court was before the Honorable Hen C. Vinton, an experienced trial judge, who allowed an appeal to th Honorable Court which was perfected, and then by this Honorab Court the cause was transferred to the Appellate Court.

As appears by the brief of the appellants, they predicated the right to recover in the Circuit Court and in this Court on a sectio of the Constitution of Indiana, Section 21, Burns' Statutes, 191 viz.:

> "No man's property shall be taken by law, without ju
> 89 compensation, nor except in the case of the state without suc
> compensation first assessed and tendered."

But however this may be, the vigorous dissenting opinion of Judg Nichols not only sounds the alarm as to whither we are tending, b in pointing out the errors of the opinion of the Court which wi hereinafter be presented in this petition raises constitutional que tions not only under the Constitution of Indiana but also under th Federal Constitution—the fourteenth amendment thereof, and th second clause of the first section thereof. As the Supreme Cou said, the denial of a constitutional right may not come until th actual entry of the judgment. So it may not be improper to sta here that a motion is made and filed concurrently with this petitio to vacate the aforesaid order of this Honorable Court transferrin this cause to the Appellate Court.

And the appellants further show that a petition for a rehearin was duly filed in said cause within the time allowed by law by th appellants, who *was* the losing party, and that said petition was ove ruled by the Appellate Court on the 4th day of October, 1921, an within thirty days before the time of the filing of this petition.

And the appellants further show the Court that the record an assignment of errors in said cause present a new question of la

and that the same was duly discussed in the brief of appellants filed in said cause, to wit:

Can any governmental agency, in this case the Board of Commissioners of Tippecanoe County, under the guise of improving a street or highway, lowering and elevating the grade thereof, actually cut off to and from said street or highway the ingress or egress which appellants and their grantors, the grantees of said commissioners, had enjoyed for more than twenty years, by removing an embankment which constituted the street upon which appellants' building abutted, and then building in the street in place of the embankment a bridge narrower than the embankment, so that the south side or edge of said bridge is 3½ feet north of appellants' north line, and thus excluding appellants, the owners of the buildings theretofore abutting on and connected with the said embankment, street or highway by a heavy stone fence on the south edge of said bridge opposite the entire front of appellants' property or lots in the town or city of West La Fayette in Tippecanoe County, Indiana, the said street or highway on said embankment being an extension of Third Street of the City of La Fayette which reached said embankment by a bridge across the Wabash River, built in 1864 by a bridge company for the purpose of extending said Third Street across Wabash River, without any compensation to the appellants therefor?

90 And furthermore in making the foundation for a pier to said bridge opposite appellants' building so undermine said building as to destroy its use.

Never has it been so held by any court in the land, and certainly not by this Court.

The appellants further show that the opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court as stated in its opinion in the following case:

Morris v. City of Indianapolis, 176 Ind. 369, at page 388.

In that it declares the law to be that the appellants did not have as against the public authorities any property right in and to said street and sidewalk as a way of ingress and egress to and from their said property that could not be taken from them.

Whereas, the Supreme Court says in the Morris case, supra at page 388, that the right of a property owner abutting on a street to ingress and egress to said street cannot be taken away.

We most respectfully and urgently state that the case made by the complaint and presented by the briefs of the appellants and the petition for rehearing presents a case not of improving and bettering a street with consequential damages to the property owner which may be more than counterbalanced by advantages, for the case here made by the appellants is that of a total destruction of their property by changing the embankment to a bridge.

The case may be stated in detail in the language of the Appellate Court itself.

In 1863 a corporation known as "The Main Street Bridge Company" was duly organized under the laws of the State of Indiana for

the purpose "of constructing and owning a bridge across the Wabash River, in Tippencanoe County, Indiana, and of *construction* and owning an embankment or causeway, which shall be most direct across the bottom land on the west side of Wabash River, and connect said bridge with the said road leading westward to La Fayette."

It further appears from the averments of said complaint that said bridge company brought suit against the then owners of said "bottom land" for the purpose of acquiring by condemnation proceedings, a strip of ground 125 feet wide and 1,560 feet long, extending from the Wabash River westwardly across the said "bottom land," said strip being in the line of said West Main Street projected; that such proceedings were had in said cause that on the 28th day of June, 1864, the said court entered its judgment and decree "that said Main Street Bridge Company stand seized in fee simple of said strip of land appropriated by said Bridge Company, as and
91 for the use of an embankment or causeway for her bridge, upon the payment of $1,347 damages within one year"; that in July, 1864, said damages were paid, and said Bridge Company at once entered upon and took possession of said strip of land, that in 1871 said Bridge Company sold, and, in consideration of $27,300 paid to it, conveyed by its warranty deed to appellee herein its toll road and bridge across the Wasbash River, situate at the foot of Main Street, in the City of La Fayette, together with all the rights, privileges and appurtenances thereunto belonging; that in June, 1875, the appellee, by its warranty deed, conveyed to one Martin, a remote grantor of appellant, a strip of ground 22½ feet wide, off the southerly side of said 125-foot strip, said strip extending from the east end of said 125-foot strip for some distance to the west, and which strip now forms the north part of appellants' lands, alleged to have been damaged, and for which this suit is brought; that for more than 20 years prior to March, 1913, a bridge, erected by appellee for the accommodation of wagons and other vehicles, had been maintained, together with the embankment, or causeway, upon which the roadway was constructed by the appellee herein; that the high waters of said river in March, 1913, undermined one of the piers of said bridge, causing the same to settle, and said bridge to become unsafe; that in September, 1913, the appellee entered into a contract for the construction of a new bridge across the Wabash River at said point, to take the place of the one so injured in the preceding March; that, according to the plans and specifications adopted for said new bridge, the west end thereof was located 170 feet to the west of the west abutment of the old bridge.

It further appears from the averments of the complaint that the said levee or causeway, extending westward from the west abutment of said old bridge, was 80 feet in width, and was constructed along the center line of said 125-foot strip; that said levee was 25 feet high; that the low-water banks of said river at said point are 12 feet high; that said levee or causeway was a public highway, and was without openings in said embankment; that from the west abutment of said old bridge a levee had been constructed southward to the right of way and embankment of the L. E. & W. Railway, and

along the east line of appellant's land, thus protecting his said lands from overflow by the water from said river; that west of said bridge, and on the southerly side of said highway, a sidewalk had been constructed, and that the appellant was the owner of a building situate on the northerly end of his said land, which building had been so built that the floor thereof was on a level with said sidewalk; that said sidewalk extended to the southerly property line of appellee, and that said building of appellant was constructed along his northerly line, and abutted sidewalk, and that appellant had access, for ingress and egress, to and from said building, to said highway across said sidewalk.

It further appears that in preparation for the construction of said new bridge the east end of said levee, or causeway, for a distance of 170 feet, from the old west pier to the new west pier, was entirely removed and taken away; that a pier for the new bridge is located 125 feet east of said west pier, and north of appellants' land; that said portion of said new bridge conforms to the old levee, or causeway, as to the center lines thereof; that said new bridge, as to the floor thereof, is nine feet higher than the old roadway; that the roadway of said new bridge is 40 feet in width from curb to curb, with a sidewalk 8 feet in width on either side thereof; that on both sides of said bridge is constructed a massive stone railing; that since the removal of said embankment the waters of said river flow over and upon the surface of appellants' property, and carry vast quantities of earth, sand and debris thereon; that appellants' access to said property has been, by the work of building said bridge as aforesaid, entirely cut off and destroyed, and that said property is now of no value, and that they have sustained damage in the sum of $12,000.

92 From the foregoing facts it will be seen that to the south of said new bridge, and between the said bridge and appellants' northerly property line, is a space of about 10 feet, land owned by the appellee, and that appellant is without any means of getting from said roadway, or bridge, onto his land.

The theory of appellant's complaint is manifest from the following averments, as found in his complaint, viz.:

"That plaintiffs' and their grantors, immediate and remote, for more than twenty years prior to the 9th day of September, 1913, *owned, and had a special interest and easement in, said levee and bridge abutment*, at the west end of said Main Street bridge, adjoining plaintiffs' property, and the maintenance of said bridge abutment and levee was necessary to the use and enjoyment of plaintiffs' property, and the preservation of plaintiffs' soil, and in the protection of plaintiffs' property against waters of Wabash River; * * * that the plaintiffs owned the rights and *easement of all the support and protection against high waters of the Wabash River which plaintiffs' property had received, and of which plaintiffs and their grantors*, immediate and remote, had been in possession for more than twenty years prior to said 9th day of September, 1913." (Our italics.)

Appellees Suffer Damages.

That the appellants have suffered a damage in the matter of this property is without question, but the nature of this damage, whether direct or simply consequential, is the matter we must now consider.

The appellee insists that the averments of the complaint show that no property of appellants was taken, and that therefore the damage complained of is merely consequential, and it therefore insists there can be no recovery. The appellants insist that they had a "special interest and easement in said levee and bridge abutment," which interest and easement was property, and which was taken, and also that they had an easement and property right in said levee and highway, as a way of egress and ingress from and to their said premises, and which also was taken, and that therefore they are entitled to the damage they have sustained.

The answer to the question presented, as we view it, depends upon the validity of the claim of appellants to a property right in and to the said embankment, and to a way of egress and ingress across said sidewalk. If appellants had any property right as against the appellee in and to said embankment, that right was taken from them.

The Main Street Bridge Company was authorized by statute to acquire a fee of the lands on which to construct its road and bridge (section 702, 2 R. S. 1852), and in the proceedings in condemnation, brought by it, as set forth in the complaint, it did, by the judgment and decree of said court, acquire title to said 125-foot strip in fee simple. This title it conveyed to the appellee which still holds the same, except said 22½-foot strip sold as hereinbefore stated. But it is urged that the sale of said strip conveyed a reversionary interest in the residue to the center line of said 125-foot strip, and that this gave the basis for the right of easement claimed.

In harmony with the foregoing authorities we hold that by and under the said deed executed by appellee, conveying said 22½-foot strip, appellants, nor their remote grantor, acquired any reversionary right to the fee of said highway, nor to any special interest therein; that appellee was holding it for the public; that appellee, in so holding it, was simply a representative of the "sovereign"—"the people."

Did the appellee- acquire any "special interest" or easement in and to said embankment and highway by reason of an uninterrupted use of the same as a way of egress and ingress to their property, by themselves and their grantors, for more than twenty years?

93

"It is immaterial whether the fee of the street was in the state or in the city or in adjoining lot holders. If in the latter, the state had an easement to repair and improve the street over its entire length and breadth, to adapt it to easy and safe passage."

Applying the principles laid down in the foregoing cases to the facts in this case, as stated in said complaint, we must hold that ap-

pellants did not have, as against the public authorities, any property right in and to said street and sidewalk, as a way of ingress and egress to and from this said property; that the damage suffered by them, under the facts alleged, was simply consequential.

A different view than that of the Court appears from the dissenting opinion of Judge Nichols, and as illustrating the novelty of the proposition advanced by the majority opinion of the Court we set out in full the opinion of Judge Nichols:

(Heretofore set out on pages 65 to 79.)

94 Appellants further show that the opinion of the Appellate Court, to wit:

"We must hold that appellants did not have as against the public authorities any property right in and to said street and sidewalk as a way of ingress and egress to and from this said property, but that the damages suffered by them under the facts alleged were simply consequential."

Contravenes a ruling precedent of the Supreme Court as stated in its opinion in the following cases:

Haynes v. Thomas, 7 Ind. 38.
Haslett v. New Albany B. T. Ry. Co., 7 App. 603.
Egbert v. Lake Shore, etc., R. R. Co., 6 Ind. App. 350.
Butterworth v. Bartlett, 50 Ind. 537.
State v. Berdetta, 73 Ind. 185.
Ross v. Thompson, 78 Ind. 90.
Cummins v. City of Seymour, 79 Ind. 491.
City of Indianapolis v. Kingsbury, 101 Ind. 200.
Town of La Fayette v. Nagle, 113 Ind. 425.
Town of Rensselaer v. Leopold, 106 Ind. 29.
Burkman v. Ohio, etc., R. W. Co., 122 Ind. 344.
Kincaid v. Indianapolis Nat. Gas Co., 124 Ind. 577.
Lostutter v. City of Aurora, 126 Ind. 436.
O'Brien v. Central, etc., Co., 158 Ind. 218.
Oler v. P. C. C. & St. L., 111 N. E. 619.
Haggert v. Stehlin, 137 Ind. 43.
The Pennsylvania Co. v. Stanley, 10 Ind. App. 421.
Dantzer et al. v. Indianapolis Union Ry. Co., 141 Ind. 604

The appellants further show to the court that the case made as stated in its complaint and as stated in the opinion of the court heretofore set out, presents a case of estoppel and that in rendering its opinion, that the appellant did not have as against the public authorities any property right into said street and sidewalk as a way of ingress or egress upon said property, the appellate court contravenes a ruling precedent of the Supreme Court as stated in its opinions in the following case:

and annul said erroneous judgment of the Appellate Court and to pronounce such judgment as shall be found proper after a full consideration of the case.

Respectfully submitted,

CHARLES M. SNYDER,
MORRIS R. PARKS,
GEORGE D. PARKS,
OTTO GRESHAM,
Attorneys for Appellant.

95 And afterwards, towit: On the 2nd day of December 1921, the same being the 5th Judicial day of the November Term 1921 of said Supreme Court, the following further pleas and proceedings were had in said cause, towit:

Come now the appellants by counsel and file Additional Authorities (8) in Support of Motion to Vacate the Order of July 22, 1919, transferring the cause to the Appellate Court, *of* in the Alternative for a Writ of Error Coram Nobis.

And afterwards, towit: On the 10th of December, 1921, the same being the 12th Judicial day of the November Term 1921 of said Spreme Court, the following further pleas and proceedings were had in said cause, towit:

Come now the appellees by counsel and file brief (8) in opposition to Motion to Vacate the Order of July 22, 1919, transferring the Cause to the Appellate Court of Indiana.

And afterwards, towit: On the same day the following further pleas and proceedings were had in said cause, towit:

Come now the appellees by counsel and file brief (8) on appellants' petition to transfer the above entitled cause.

And afterwards, towit: On the 10th of January 1922, the same being the 38th Judicial day of the November Term 1921 of said Supreme Court, the following further pleas and proceedings were had in said cause, towit:

Come now the parties by counsel, and the Court being fully advised in the premises, denies appellants' petition to transfer the above entitled cause to the Supreme Court.

96 And afterwards, towit: On the 25th of January, 1922, the same being the 51st Judicial day of the November Term 1921 of said Supreme Court the following further pleas and proceedings were had in said cause, towit:

Come now the parties by counsel, and the Court being fully advised in the premises, denies appellants' motion to Vacate the Order of July 22, 1919, transferring the cause to the Appellate Court.

And afterwards, towit: On the 8th of February, 1922, the same being the 63rd Judicial day of the November Term 1921 of said

Supreme Court the following further pleas and proceedings were had in said cause, towit:

Come now the appellants by counsel and file in the office of the Clerk of the Supreme Court their petition for the allowance of a writ of error, said petition and the allowance thereof being hereto next below attached, and being as follows:

97 The Supreme Court of the State of Indiana.

No. 10623.

WILLIAM RANDALL et al., Appellants,

vs.

BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA.

Petition for Writ of Error to the Supreme Court of the United States.

To the Honorable Louis B. Ewbank, Chief Justice of the Supreme Court of Indiana:

The petition of William Randall and George S. Akres respectfully shows:

That on the 30th day of September, 1914, your petitioners begin their action in the Superior Court of Tippecanoe County against the Board of Commissioners of Tippecanoe County, Indiana, to recover compensation under Section 21 of the Bill of Rights of the State of Indiana, and as construed in the case of Pompelly v. Green Bay Company, 13 Wallace, 166 on pages 177 and 178 in the Supreme Court of the United States for the "taking" of, the absolute destruction, or the rendering it impossible for your petitioners to use their real estate, in order that the Board of Commissioners might build as they did another bridge in place of the bridge across the Wabash River that was injured by the unprecedented flood of 1913. The only damage to the bridge was to one of the piers. The causeway which constituted the approach to said bridge in front of your petitioners' property and a levee on the south of your petitioners'

98 property had excluded the high water for more than twenty years before, and during all of which time said bridge withstood the floods. That the 22½ feet of your petitioners' property immediately south of the south line of said causeway was acquired by your petitioners by means of conveyance from the appellee herein by means of warranty deed from said appellee, after the appellee had caused said bridge and approach thereto, or causeway to be constructed.

The embankment or approach to the old bridge across the Wabash River in front of your petitioners' property, constituted part of "Main Street" being the main highway between the City of La Fayette and the Town of West Lafayette. And your petitioners' building, which was a business block was built flush up to and on

a level with the south line of the sidewalk in front of said building into the store room at which entrance was had from said sidewalk. That the south line of said sidewalk was the north line of your petitioners' building. The new bridge is longer than the old, extending past your petitioners' property, but narrower there than was the approach or causeway directly in front of petitioners' premises. But more than this the new bridge was constructed so that it was from thence, now is and ever will be impossible for your petitioners to ever get to and from their real estate, for this "new bridge" is narrower than the old embankment there was in front of your petitioners' property. That a space of ten feet intervenes between your petitioners' north line and the new bridge, on both sides of which is constructed a massive stone railing. And thus as the Appellate Court avows in its opinion, your petitioners' "access" to said property has been, by the work of building said bridge as aforesaid, entirely cut off and destroyed, and that said property is now of no value, and they have sustained damages to the sum of $12,000.00.

The new bridge is seven feet higher than the old. It is not the case of building an elevated structure in a street leaving it
99 possible for the abutting property holder to still use his property.

The avowed purpose and intent of the Commissioners aforesaid before they indemnified the contractor in the premises—was the destruction of your petitioners' property for the public road. "Damnum absque injuria" is the only answer vouchsafed, although the position of the petitioners is that "the taking," the injuring the destruction or if it be only "consequential damages" as the appellee the court below, the Appellate and the Supreme Court of Indiana hold, is contrary to the 21st Section of the Bill of Rights of the Indiana Constitution, and the 14th Amendment to the Constitution of the United States. That if said section 21 of the Bill of Rights sanctions the destruction of your petitioners' property as aforesaid, said section is invalid under the second clause of the first section of the 14th Amendment aforesaid.

Your petitioners further show that before the destruction of their property as aforesaid, they endeavored by salvage to reduce the damages as much as possible, imposed no obstacle to the appropriation and destruction of their property and then after its destruction brought their aforesaid action, which the Superior Court of Tippecanoe County on the 16th day of January, 1919, on demurrer to their complaint held for naught and dismissed, but then and there allowed an appeal to the Supreme Court of Indiana.

Your petitioners further show that they duly perfected their appeal to the Supreme Court of Indiana, which was docketed as Cause No. 23567, filed their brief in due time, to which the appellee was preparing to respond by brief, and was only asking time in which to prepare said brief in addition to that granted by the rules of the court, because of the gravity of the issues involved, when the Supreme Court of Indiana, on the 22nd day of July, of its own
100 motion transferred the cause to the Indiana Appellate Court, because there was no constitutional question involved

And your petitioners further show that the only question considered in the Appellate Court was the construction of Section 21 aforesaid; that the counsel for the appellee pointed out that said section differed from similar sections in other states,—which had been amended so as to make said section conform to the 14th Amendment to the Constitution of the United States—as a reason why your petitioners' damages were damnum absque injuria.

Your petitioners further show that, on the 10th day of June, 1921, the Appellate Court by the full bench, all the six judges participating, affirmed the judgment of the Superior Court of Tippecanoe County, and that in and by the opinion of the court the only question discussed was the construction of Section 21 of the Bill of Rights of the Indiana Constitution, and decisions hereunder. That in and by the dissenting opinion of Judge Nichols, it is pointed out, that the judgment of the Superior Court of Tippecanoe County, is not only in contravention of Section 21 of the Indiana Bill of Rights, but also under the Federal constitution of the United States —that is, that Section 21 and the judgment of the Superior Court of Tippecanoe County, Indiana, and the construction of Section 21 as proposed by the majority opinion of the Appellate Court, was and would be contrary to the second clause of the first section of the 14th Amendment to the Constitution of the United States.

And your petitioners further show, that Judge Nichols pointed out in his dissenting opinion that the majority opinion was construing the word "taking," contrary to the way that word was construed by the Supreme Court of the United States in construing similar provisions in the Constitution of the State of Wisconsin,

and so your petitioners say there arose in said Appellate
101 Court a question under the 14th Amendment to the Constitution of the United States, even though no question arose under the Constitution of Indiana.

And your petitioners show that a petition for a rehearing was duly filed in said cause by your petitioners within the time allowed by law, and that said petition was overruled by the Appellate Court on the 4th day of October, 1921.

And your petitioners further show that within the time allowed by law, towit, on the 3rd day of November, 1921, they filed in the Supreme Court of Indiana, which is the highest court in the State of Indiana, their motion to vacate the order of said court of July 22, 1919, transferring said cause to the Appellate Court, and also their petition to transfer said cause from the Appellate Court to the Supreme Court, the method provided by law for the review by the Supreme Court of Indiana of the judgments of the Appellate Court, because in and by the record remaining in the Appellate Court there arose among other questions the question as to whether Section 21 of the Bill of Rights of the Indiana Constitution was valid under the second clause of the first section of the Constitution of the United States. That on the 25th day of January, 1922, the Indiana Supreme Court finally denied the prayer of said petition to transfer said cause from the Appellate to the Supreme Court, and said motion to vacate the order of July 22, and for right and justice in

the premises, and ordered that said judgment of the Appellate Court should be affirmed and that the record in said cause should remain in said Appellate Court, which thereupon made the judgment of the Appellate Court the final judgment in the cause. Said record is now in said Appellate Court.

102 Inasmuch as certain errors appear in the judgment entered upon the refusal of the Supreme Court of Indiana to transfer said cause and to vacate the order of July 22, 1919, and the proceedings had prior thereto, as recited in the annexed assignment of errors, your petitioners pray for the allowance of a writ of error returnable to the Supreme Court of the United States, and a citation.

WM RANDALL AND
GEORGE S. AKERS,
By OTTO GRESHAM,
Their Attorney.

Jan. 31, 1922.

Allowed.

LOUIS B. EWBANK,
Chief Justice.

103 [Endorsed:] No. 10623. Supreme Court of the State of Indiana. Wm. Randall, et al., Appellants vs. Board of Commissioners of Tippecanoe County, Ind. Petition for Writ of Error to the Supreme Court of the United States. Filed Feb. 8, 1922. Patrick J. Wyatt, Clerk. Otto Gresham, Attorney for petitioners.

104 And on the same day the following further pleas and proceedings were had in said court in said cause:

Come now the appellants by counsel, and file an assignment of errors on the writ of error herein, said assignment of error being hereto *b*ext below attached, and being as follows:

105 The Supreme Court of the State of Indiana.

No. 10623.

WILLIAM RANDALL, GEORGE S. AKERS, Plaintiffs in Error,

and

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA, Defendant in Error.

Assignment of Errors.

Come now the plaintiffs in error and respectfully submit that in the record, proceedings, decision, opinion and final judgment of the Supreme Court of the State of Indiana, in the above entitled matter there is manifest error in this, towit:

1. The court erred in holding that section 21 of the Bill of Rights of the Constitution of the State of Indiana, being Section 66 of Burns' Statutes of 1914 of Indiana, was not invalid under the second clause of the first section of the 14th Amendment to the Constitution of the United States.

2. The second clause of the 14th Amendment to the Constitution of the United States operated to write into Section 21 of the Bill of Rights of the Constitution of the State of Indiana the word "injured," and the courts of Indiana, towit: the Superior Court of Tippecanoe County, Indiana, the Appellate Court of Indiana and the Supreme Court of Indiana erred in not holding said section 21 so amended.

3. The plaintiffs in error say that the sole question involved in the transcript is the construction of the word "taking" in Section 21 of the Bill of Rights of the Constitution of the State of
106 Indiana, and that while the courts of Indiana, nisi prius and appellate, might have been right in construing said word as excluding the word "injury," notwithstanding the construction by the Supreme Court of the United States in the case of Pompelly v. Green Bay Company, 13 Wal. 166, on pages 177-178, of the word "taking," although the plaintiff in error apprehends and charges that the courts of Indiana should have followed the construction of the Supreme Court of the United States aforesaid, the plaintiff in error says that after the adoption of the 14th Amendment to the Constitution of the United States the courts of Indiana were bound to follow the construction of the word "taking" as laid down by the Supreme Court of the United States and erred in not so doing, as appears by the transcript in this cause.

4. The Superior Court of Tippecanoe County erred in construing the word "taking" in said section, in that it did not construe said section according to the construction put upon said word in the case of Pompelly v. Green Bay Company, in 13 Wallace, 166, on pages 177 and 178.

5. The Superior Court of Tippecanoe County erred in holding that the plaintiff in error's damages were damnum absque injuria—and in entering the judgment of June 16, 1919.

6. The Supreme Court of Indiana erred by its order of July 22, 1919 in transferring said cause to the Appellate Court of Indiana, because there was no constitutional question involved in the record in said cause.

7. The Appellate Court of Indiana erred in construing the word "taking" in Section 21 of the Bill of Rights in the Constitution of the State of Indiana.

8. The Appellate Court erred in construing the word "taking" in Section 21 of the Bill of Rights in the Constitution of the State of
107 Indiana contrary to the construction put on said word by the Supreme Court of the United States in the case of Pompelly v. Green Bay Company, 13 Wallace, 166 on pages 177, 178.

9. The Appellate Court of Indiana erred in not holding Section 21 of the Indiana Bill of Rights invalid under the second clause of the first section of the 14th Amendment to the Constitution of the United States.

10. The Supreme Court of Indiana erred in holding that Section 21 of the Bill of Rights of the Constitution of the State of Indiana, as construed by the Superior Court of Tippecanoe County, Indiana and the Appellate Court, was not invalid under the second clause of the second section of the 14th Amendment of the Constitution of the United States.

11. The Superior Court of Tippecanoe County, Indiana, the Appellate Court of Indiana and the Supreme Court of Indiana erred in holding that the action of the Board of Commissioners did not deprive the plaintiffs in error of their property without due process of law.

12. That the Supreme Court of Indiana erred in entering its order or judgment of January 10, 1922 in refusing to transfer said cause from the Appellate Court to the Supreme Court.

13. That the Supreme Court of Indiana erred in entering its order of January 25, 1922, in refusing to vacate its order of July 22, 1919, and refusing to grant the plaintiffs in error right and justice under the first section of the 14th Amendment to the Constitution of the United States.

14. The Supreme Court of Indiana erred in holding that the third section of Section 1392 of Burns' Statutes of Indiana of 1914, and the 14th Section of Section 1392 thereof are not invalid under the second clause of the first section of the 14th Amendment to the Constitution of the United States in that they denied to the
108 plaintiff in error the equal protection of the law, in that they allow a review by the Supreme Court of the State of Indiana in a case where there are damages which are assessed by way of a judgment to the amount of $6,000.00 or more, but allow no review by the Supreme Court of Indiana, where the damages are acknowledged to be greater, but there is no award, and a judgment for said damages is denied the injured party.

15. Plaintiffs in error further say that the action of the Board of Commissioners of Tippecanoe County aforesaid is repugnant to and in conflict with Article 14, section 1 of the Constitution of the United States which says, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law."

16. Plaintiffs in error further say that the judgment of the Superior Court of Tippecanoe County, Indiana aforesaid is repugnant to and in conflict with Article 14, section 1 of the Constitution of the United States which says, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States, nor shall any state deprive any person of life, liberty or property without due process of law."

17. Plaintiffs in error further say that the decision of the Appellate Court of the State of Indiana, aforesaid is repugnant to and in conflict with Article 14, Section 1 of the Constitution of the United States which says, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law."

109 18. Plaintiffs in error further say that the judgment of the Supreme Court of the State of Indiana, aforesaid is repugnant to and in conflict with Article 14, section 1 of the Constitution of the United States which says, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law."

Wherefore the said William Randall and George S. Akers pray that the judgment of the Appellate Court of Indiana be held void and for naught and reversed, and that the judgment of the Superior Court of Tippecanoe County, Indiana be held void and for naught and reversed, and that they be granted right and justice in the cause.

OTTO GRESHAM,
Attorney for Plaintiffs in Error.

110 [Endorsed:] No. 10623. Supreme Court of the State of Indiana. Wm. Randall, et al., Plaintiffs in Error, vs. The Board of Commissioners of Tippecanoe County, Ind. Assignment of Errors. Filed Feb. 8, 1922. Patrick J. Lynch, Clerk. Otto Gresham, Attorney for Plaintiffs in Error.

111 And on the same day, the following further pleas and proceedings were had in said court, in said cause:

Come now the appellants by counsel, and file their bond on writ of error from the Supreme Court of the United States in the penal sum of Five Hundred Dollars ($500.00) which bond is now taken and approved, by Honorable Louis B. Ewbank, Chief Justice, a copy being hereto next below attached, and being as follows:

The Supreme Court of the State of Indiana.

No. 10623.

WILLIAM RANDALL, GEORGE S. AKERS, Plaintiffs in Error,

vs.

BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA, Defendant in Error.

Bond.

Know all men by these presents, that we, William Randall and George S. Akers, as principals and Samuel Julien as surety, are held and firmly bound unto the Board of Commissioners of Tippecanoe County in the sum of Five Hundred Dollars ($500.00) to be paid to the said obligees, their successors and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of February, A. D. 1922.

Whereas the above named plaintiffs in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Supreme Court of the State of Indiana.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said
112 writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

WILLIAM RANDALL.
GEO. S. AKERS.
SAMUEL JULIEN.

STATE OF INDIANA,
County of Benton, ss:

On this 7 day of February, 1922, personally appeared before me Samuel Julien who being duly sworn deposes and says that he is the surety on the foregoing bond; that he signed the same and that he is possessed of real estate in the Benton County, State of Indiana, worth $2,000.00 over and above all incumbrances.

[Seal of Will D. Menefee, Notary Public, Benton County, Indiana.]

WILL D. MENEFEE,
Notary Public.

My Commission expires Sept. 25, 1922.

I hereby approve the foregoing bond and surety this 8 day of February, 1922.

LOUIS B. EWBANK,
Chief Justice of the Supreme Court of Indiana.

Filed Feb. 8, 1922.
PATRICK J. LYNCH, *Clerk.*

113 And on the same day the following further pleas and proceedings were had in said court, in said cause:

Come now the appellants by counsel, and file a writ of error from the Supreme Court of the United States, to the said Supreme Court of Indiana, in this cause, said writ of error being hereto next below attached, and being as follows:

114 UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judge of the Supreme Court of Indiana, Greeting:

Because in the record and proceedings, as also on the rendition of the judgment of a plea which is in the said Supreme Court, before you, between William Randall and George S. Akers, and Board of Commissioners of Tippecanoe County a manifest error hath happened, to the great damage of the said William Randall and George S. Akers as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, and the seal of The United States District Court for the District of Indiana, this 8th day of February, A. D. 1922.

[Seal of the District Court of the United States, District of Indiana.]

NOLAN C. BUTLER,
Clerk of the District Court of the United States for the District of Indiana.

Feb. 11, 1922.
Writ allowed.
LOUIS B. EWBANK,
Chief Justice Supreme Court of Indiana.

Copy of above writ for the defendant in error lodged in the Clerk's Office of the Supreme Court of *the* Indiana on the 8th day of February, 1922.

In obedience to the above writ I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the above entitled cause, this — day of —— A. D. 19—.

——— ———,
Clerk of the Supreme Court of Indiana.

[Endorsed:] No. —. District Court of the United States for the District of Indiana. Writ of Error to The Supreme Court of the United States. Filed Feb. 8, 1922. Patrick J. Lynch, Clerk.

115 And afterwards, to wit: On the 10th of February 1922, the same being the 65th Judicial day of the November Term 1921, the following further pleas and proceedings were had in said cause, to wit:

Come now the appellants by counsel, and file their citation on said writ of error, duly signed by Honorable Louis B. Ewbank, Chief Justice of said Supreme Court, and proof of service of the citation on the defendant in error, said citation and proof of service thereof being hereto next below attached, and being as follows:

116 UNITED STATES OF AMERICA:

To the Board of Commissioners of Tippecanoe County, Indiana, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Indiana, wherein William Randall and George S. Akers are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Louis B. Ewbank, Chief Justice of the Supreme Court of the State of Indiana, this 8th day of February, in the year of our Lord, One Thousand nine hundred twenty-two.

LOUIS B. EWBANK,
Chief Justice of the Supreme Court of Indiana.

Copy of the within citation received this 9th day of February, 1922.

GRANT DYER,
Chairman of Board of Commissioners of Tippecanoe County, Indiana.

Filed Feb. 10, 1922.
PATRICK J. LYNCH,
Clerk.

117 And afterwards, to wit: On the 11th day of February 1922, the same being the 66th Judicial day of the November Term 1921 of said Supreme Court, the following further pleas and proceedings were had in said cause, to wit:

Come now the appellants by counsel and file their præcipe for transcript of record, which said præcipe is in the words and figures following, to wit:

118 STATE OF INDIANA:

In the Appellate Court.

No. 10623.

WILLIAM RANDALL et al., Appellants,

vs.

BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA.

Præcipe for Transcript of Record.

Hon. Patrick J. Lynch, Clerk of the Supreme Court and ex-Officio Clerk of the Appellate Court of Indiana:

In making return of the writ of error in the above entitled cause please incorporate in the transcript the following:

1. Transcript of the record from the Superior Court of Tippecanoe County, Indiana to the Supreme Court of Indiana.

2. Petition of the appellee in the Supreme Court of Indiana asking for an extension of time in which to answer the brief of the appellant.

3. Order of July 22, 1919, transferring the cause to the Appellate Court of Indiana.

4. All the proceedings in the Appellate Court of Indiana, except the briefs filed, including the opinions and decisions of that Court.

5. Appellants' motion to the Supreme Court of Indiana to vacate the order of July 22, 1919, and the petition to the Supreme Court to transfer the cause from the Appellate Court to the Supreme Court of Indiana and the order of the Supreme Court overruling said motion, and the order denying the prayer of said petition.

5. The original petition of the appellant to the Honorable Louis B. Ewbank, Chief Justice of the Supreme Court of Indiana,
119 for a writ of error to the Supreme Court of the United States, and the allowance thereof by the chief justice of the Supreme Court of Indiana, the original assignment of errors, a copy of the bond on the writ of error, the original citation to the defendant in

error and the acceptance of service thereon, the original writ of error, and copy of this præcipe.

OTTO GRESHAM,
Attorney for Appellants.

Filed Feb. 11, 1922.
PATRICK J. LYNCH,
Clerk.

120 STATE OF INDIANA:

In the Supreme Court.

I, Patrick J. Lynch, Clerk of the Supreme Court and ex-officio Clerk of the Appellate Court of Indiana, certify the above and foregoing to be a full and complete transcript of the record of the proceedings had, papers filed, motions decided, rulings made, opinions delivered, judgments rendered and all decrees and orders entered in the Supreme Court of Indiana in cause No. 23567, and in the Appellate Court of Indiana in cause No. 10623, this being the same cause, wherein William Randall and George S. Akers were appellants and the Board of Commissioners of Tippecanoe County, Indiana, was appellee, appealed from the Tippecanoe Superior Court of Tippecanoe County, Indiana, also the original petition with allowance for writ of error; the original writ of error from the Supreme Court of the United States to the Supreme Court of Indiana with the allowance thereof; the original citation to defendant in error and proof of service thereof; copy of the original bond and its approval by the chief justice of said Supreme Court of Indiana, and the assignment of errors presented to the chief justice of the Supreme Court of Indiana. Which said transcript annexed hereto together with said original petition with allowance of writ of error, the original order of allowance of writ of error, the original assignment of error, the original citation, a copy of the original bond, and præcipe for transcript of record, I hereby certify as and for my full return to said writ of error.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at the City of Indianapolis this 11th day of February, 1922.

[Seal of the Supreme Court, State of Indiana.]

PATRICK J. LYNCH,
Clerk of the Supreme Court and Ex-Officio Clerk of the Appellate Court of Indiana.

Endorsed on cover: File No. 28,722. Indiana Supreme Court Term No. 274. William Randall and George S. Akers, plaintiffs in error, vs. The Board of Commissioners of Tippecanoe County, Indiana. Filed February 20th, 1922. File No. 28,722.

Office Supreme Court, U. S.
FILED
FEB 9 1923
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1922

No. 274

WILLIAM RANDALL and GEORGE S. AKERS,
Plaintiffs in Error,

VS.

THE BOARD OF COUNTY COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

Motion of Plaintiffs in Error for leave to file a brief on the question of Jurisdiction, and Brief in Reply of Plaintiffs in Error on the question of Jurisdiction.

OTTO GRESHAM,
Attorney for Plaintiffs in Error.

MESSENGER & MCDANIEL PRINT-JAX

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1922

No. 274

WILLIAM RANDALL and GEORGE S. AKERS,
Plaintiffs in Error,

VS.

THE BOARD OF COUNTY COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

Motion of Plaintiffs in Error for leave to file a brief on the question of Jurisdiction.

Comes now the Plaintiffs in Error and moves the court for leave to file instanter the brief hereto attached on the question of jurisdiction.

OTTO GRESHAM,
Attorney for Plaintiffs in Error.

MESSENGER & McDANIEL PRINT-JAX

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1922

No. 274

WILLIAM RANDALL and GEORGE S. AKERS,
Plantiffs in Error,

VS.

THE BOARD OF COUNTY COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA
Defendant in Error.

Brief of Plantiffs in Error in Reply on the Question of Jurisdiction.

On the question of jurisdiction, as presented in the brief of the defendant in error, it was essential that we exhaust our remedy in the Supreme Court of Indiana before any writ of error would lie to this Court. And as to Mr. Justice McRenolds' question why was the writ run to the Supreme Court instead of the Appellate Court, the answer is in part, a writ to the Apellate Court would not have brought to this Court a complete record, the Indiana Appellate procedure being different than that of any other State in the Union so far as the reports of this Court disclose, as will appear from a glance at Section 1392 of Burns' Revision of the Indiana Statutes of 1914 and ex parte France 176 Indiana 72, cited on page 14 of our brief.

It is a different situation than that in Missouri to which Mr. Justice Van Devanter adverted. Different than that in New York, Southern Pacific Company vs. Jenson, 244 U. S. 205, although in this case the Chief Justice of the Court of Appeals of New York signed an order reciting the importance of this court finally passing on the questions involved.

But in this New York case the record had never been in the Court of Appeals of New York. In the case at bar the cause in the first instance landed in the Indiana Supreme Court and counsel for defendant in error said that is where the jurisdiction was.

At the bottom of page 29 of the transcript in appellees petition for an extension of time for filing its brief in the Indiana Supreme Court is this sentence:

"That this court has jurisdiction of said cause and the brief of appellee will be upon the merits of said cause."

An examination of the transcript (T 66) shows that on January 10, 1922, the Supreme Court of Indiana denied the petition to transfer, but not until January 25, 1922, (T 66) did it rule on the motion to vacate the order of July 22, 1922, transferring the cause from the Supreme to the Appellate Court and the petition by a writ of error *coram nobis.*

Meanwhile, it was most respectfully and considerately suggested to the Supreme Court of Indiana, that we were then and there operating under the Constitution of the United States, and especially the 14th Amendment thereof and as a condition precent to our right to sue out a writ of error to the Supreme Court of the United States a mandamus might lie, and that an application for a writ of error to the Supreme Court would not be made until there had been a ruling on the motion to vacate the order of July 22nd and the petition for a writ of error *coram nobis.*

Leaving out of consideration Section 19 of the Criminal Code, the right to get up a record presenting the Federal questions was one secured by the Constitution and laws of the United States, and especially the 14th Amendment thereof, for as this Court said by Mr. Justice Bradley in the "Civil Right Cases," 109 U. S. 3, 20, 23, and in Clyatt vs. U. S. 197, U. S. 207, "this amendment as well as the 13th is self-executing without any aucillary legislation."

"Under the 14th Amendment it (Congress) has power to counteract and render nugatory all state laws and *proceedings* which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due pro-

cess of law, or to deny to any of them the equal protection of the laws." * * *

"Under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations and *proceedings*."

"*Proceedings*" is a broad word. "Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court," said this court in Virginia against Rives, 100 U. S., 313, on page 322.

The proceedings in the Indiana Court are peculiar, to say the least. The party who inflicts an injury and is mulcted in damages can appeal to the Supreme Court of Indiana, if the judgment is greater than $6,000.00, but the party who is injured cannot have his case looked into by the Indiana Supreme Court even though his damages are avowed to be greater than this amount by the inferior judicial tribunals of the State.

Another peculiarity is that the clerk of the Indiana Supreme Court is also the clerk of the Indiana Appellate Court and that the revisory power of the Indiana Supreme Court by way of the petition to transfer, and the section of the statute, Section 1392 of Burns Revision and ex parte France 176, Ind. 72, vesting it with the power to transfer causes in the first instance to the Appellate Court renders the Appellate Court an auxiliary or branch court of the Supreme Court, with the latter in the control of the records of the former, through the control of the clerk as will appear from the praecipe and the clerks return thereto on pages 77 and 78 of the transcript.

The practice is unique in that while the "petition to transfer" is filed in the Appellate Court in the cause therein and numbered accordingly, it is heard by the Supreme Court and is entitled in the Supreme Court.

I willingly complied with this practice as to the petition to transfer. But as to the motion to vacate and the petition for the writ of error *coram hobis* as this court will see by examining the transcript at page 56, this motion and petition was numbered in the cause in the Supreme Court viz: No. 23567. I protested to the clerk against filing it in No. 10623 in the Appellate Court as absurd inasmuch as

the Appellate Court was utterly without jurisdiction to entertain it, because it presented a constitutional question of which the Appellate Court had no jurisdiction as well as the petition to transfer. The clerk put on the No. 10623 and he did not remove the No. 23567.

While it may be immaterial, I insisted and got on file the motion to vacate and the petition for the writ of error first, that is before the petition to transfer was filed. My theory was that on the motion to vacate and the petition in the alternative, the original record or at least a copy of it, became a part of that motion and petition or would become again a part of the records of the Supreme Court as it was before the order of July 22, 1919.

Indeed I claimed the record from the Superior Court of Tippecanou County, as I do now, had never ceased to be a part of the records of the Supreme Court of Indiana. And it was absurd to file the motion and petition with the clerk of the Appellate Court to revise an order of the Supreme Court.

But said Patrick H. Lynch, clerk of the Supreme Court and ex officio clerk of the Appellate Court, "when the Supreme Court takes up that motion to vacate that order and the petition for the writ of error and the petition to transfer, it takes jurisdiction of both cases and you can control it with your praecipe if you get a writ of error allowed to the Supreme Court of the United States.

Had the writ been directed to the clerk of the Indiana Appellate Court, assuming it had such an officer, there would not have been a complete transcript of the cause here, certainly not showing that the plaintiff in error had raised the Federal questions in the highest court in which these questions could be raised. They were questions that could not under the laws of Indiana be passed on by the Indiana Appellate Court. Upon these arising the Appellate Court lost jurisdiction, but, as Judge Nichols said, the Appellate Court could not reverse the Supreme Court.

Indeed in these proceedings its judgment was not final and did not become so until the order or judgment of the Supreme Court of January 25th, 1922. This was the final order in the case.

This is manifest from the writ of error, although it is not as definite and specific as I drafted it. Noble C. Butler, the clerk of the United States District Court for the District of Indiana, insisted on using the printed form provided by the Department of Justice for such cases.

Previous to the application to Mr. Butler, Lewis B. Eubank, Chief Justice of the Supreme Court of Indiana, had refused to sign the draft of an order presented to him entitled in the Supreme Court of Indiana in No. 22567, allowing the writ of error to this court, and reciting inasmuch as a Federal question had arisen or been presented in the Supreme Court of Indiana, the highest court in Indiana in which such a question could be considered, and had been overruled and being desirous of having said question considered by the Supreme Court of the United States, and reciting the approval of the bond and the signing of the citation to the defendant as well, the writ of error is allowed.

Clerk Butler, when I told him the Chief Justice of Indiana had refused to sign a form of order allowing the writ of error, said "it takes mighty little evidence to satisfy me he has done so, that citation signed by him is enough, but I must use the form they furnish me."

But tven in that form complaint is made that "in the record and *proceedings* as well as in the judgment of a plea in the said Supreme Court manifest error hath happened."

Returning to Chief Justice Eubank I renewed my request for the signature of the aforesaid formal order with all the necessary recitals allowing the writ of error. He refused, but wrote on the writ the words:

"Feb. 11, 1922.

"Writ allowed.

"LEWIS B. EUBANK,

"Chief Justice, Supreme Court, Indiana."

"You can lead a horse to water, but you cannot make him drink." But he can't say you did not have the water before him, the entire Ohio river, as one man once said about his horse.

We most respectfully submit that we presented to the Indiana Supreme Court questions of constitutional law under the Constitution of the United States as important as any that will come up in the Chicago Board of Trade case

soon to be argued, and that a writ of error to the Indiana Appellate Court would not have been proper, for, as dissenting Judge Nichols of the Indiana Appellate Court said, in his dissenting opinion, the Appellate Court cannot overrule the Supreme Court."

Moreover a writ of error to the Appellate Court could not have furnished this court with a complete transcript of "*the proceedings*" in the Supreme Court.

If we made the mistake of not specifically asking that the order or judgment of the Supreme Court of Indiana of January 25, 1922, be reversed we ask leave now to amend the prayer of the assignment of errors and ask for the revisal of that order.

Respectfully submitted,

OTTO GRESHAM,

Attorney for Plaintiffs in Error.

Office Supreme Court, U. S.
FILED
DEC 1 1922
WM. R. STANSBURY
CLERK

WITHDRAWN

Office Supreme Court, U. S.
FILED
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CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1922.

No. 274.

WILLIAM RANDALL and GEORGE S. AKERS,
Plaintiffs in Error,

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

Brief and Argument for Plaintiffs in Error.

OTTO GRESHAM,
Attorney for Plaintiffs in Error.

BARNARD & MILLER PRINT, CHICAGO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1922.

No. 274.

WILLIAM RANDALL and GEORGE S. AKERS,
Plaintiffs in Error,

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT.

This is a writ of error to the Supreme Court of Indiana.

The case involves the meaning of a single word, "*taken*," in Section 21 of the present Indiana constitution, adopted in 1850, viz.:

> "No man's property shall be *taken* by law, without just compensation." * * *

As counsel for the defendant in error urged, because Section 21 had never been amended as some other states had changed their organic law, the Indiana judges, except for a powerful dissent based on the case of *Pum-*

pelly v. *The Green Bay Co.*, 13 Wallace 166, the second clause of the first section of the Fourteenth Amendment of the Constitution of the United States and the first clause of Section 10 of Article 1 of the Constitution of the United States, held that so long as the injury to the citizen's property is "consequential," and that injury may be the entire destruction of a building, it is not a "taking" under Indiana organic law. Indeed a majority of the Indiana judges, ignoring former decisions of the Indiana Supreme Court, say the officers of the law may enter a citizen's premise, destroy his building in the course of prosecuting a public improvement, withdraw and then say it is not a "taking."

On the 30th day of September, 1914, the plaintiffs in error begun their action for damages against the Board of Commissioners of Tippecanoe County, in the Superior Court of that county, because of the destruction of a building on certain described lots in the Town of West Lafayette. After the case was set for trial (Tr., 2) the venue was changed by the defendant to the Montgomery County Circuit Court and then by consent back to Tippecanoe County, where on December 20, 1918, the 77th day of the September term, after an answer of general denial (Tr., 5) was filed by defendant, a trial was entered upon on January 3, 1919, without a jury. The trial continued and was not concluded when court adjourned on the next day, the fourth Saturday.

On Monday following the first day of the January term, 1919 (Tr., 6), by agreement the submission to the court for trial was set aside, and the plaintiffs were given leave to "file an amended complaint in two paragraphs."

First paragraph of the amended complaint:

> "That on the 9th day of September, 1913, the plaintiffs in error were the owners and since the 28th day of September, 1911, had been the owners of Lots

52, 53 and 54 of Martin's Addition to the Town of West LaFayette in Tippecanoe County, Indiana. That West Lafayette had been an incorporated town for more than 30 years prior to the day last named and was situated on the west bank of the Wabash River, which then and there ran from the north to the south, and opposite to the City of Lafayette. That the two places were connected by a bridge from the western terminus of 'Main street' in the City of Lafayette across the river, and thence from a large stone abutment constituting the west end of the bridge and on the west side of the river, a levee and approach extended westerly 1,200 feet through the Town of West Lafayette through or across what had been part of the original flood plan of the river to the higher ground."

This low ground or "bottom land' was 12 to 15 feet above low water, and the west end of the bridge and levee were 25 feet above this level.

That this bridge was known as "the Main street bridge." That it was constructed by and was under the control of the defendant. That it and the levee constituted the principal highway or street connecting the City of Lafayette with the Town of West Lafayette and had been so used by the public, the plaintiffs and their grantors and had been so maintained by the defendant for more than 20 years prior to the 9th day of September, 1913.

That the levee constituting the street was 80 feet wide consisting of a roadway and sidewalk on both sides from the western end of the bridge on through the Town of West Lafayette.

That the plaintiff's lots aforesaid abutted on said levee or street on the south side thereof and extended south by means of another lot, 18, in Chauncey's Plat of Bottom Lands to the right of way of the Lake Erie and Western Railway, which crossed the river on a bridge and thence across the bottom lands on a levee fill or

embankment. That by means of embankments, one close to the river, beginning at the southwest corner of Lot 52, connecting the aforesaid Main street levee and the Lake Erie Railroad levee and constructed by plaintiff's grantors, the lands constituting Lots 52, 53 and 54, were free and had been for more than 20 years from the overflow of the high waters of the Wabash River.

The complaint proceeds (Tr., 8):

> "That plaintiffs and their grantors had made fills of earth on the south side of said levee, approach and abutment of said Main street bridge on said Lots 52, 53 and 54 and had constructed thereon valuable buildings and improvements extending across the north end of Lots 52, 53 and 54; that said improvements and buildings had been so constructed that the same were adapted to the grade and conditions of said highway (street), and ingress and egress to plaintiff's property was from said highway to said property and was unobstructed.
>
> That the first floor of said buildings were constructed at the grade of said highway, and said buildings abutted upon the south side of the sidewalk on said street and highway."

That for more than 20 years prior to the 9th day of September, 1913, the plaintiffs and their immediate grantors had a special interest in said highway and were the owners of the fee of the lands occupied by said levee and highway adjacent to plaintiff's land, subject only to the public use thereof as a highway. That plaintiffs and their grantors, immediate and remote, for more than 20 years prior to the 9th day of September, 1913, owned and had a special interest and easement in said levee and bridge abutment at the west end of said Main street bridge adjoining plaintiffs' property, and the maintenance of said bridge abutment and levee were necessary to the use and enjoyment of plaintiffs' property and the preservation of plaintiffs' soil, and in the protec-

tion of the plaintiffs' property against the waters of the Wabash River.

The first amended paragraph then sets up that the portion of the street upon which the plaintiffs' lots abut, the lots and the buildings thereon, protected as they were by the abutments and levees had never overflown or suffered any damage, not even during the unprecedented and extraordinary flood of 1913. But this flood injured one of the piers of the bridge and at that pier the bridge settled.

That on the 9th day of September, 1913, the defendant entered into a contract for the construction of a new bridge in place of the injured bridge to be longer to the west and past plaintiffs' premises by 170 feet than was the old bridge. That on September 20, 1913, the defendant entered into a contract for the removal of the levee or embankment and abutment of said street in front of plaintiffs' premises to be replaced by the extension of the bridge with a pier in front of plaintiff's premises.

> "That by the terms of said contracts for the construction of said bridge, and by the plans and specification therefor, the defendant assumed all damages to private property occasioned by the construction of said work."

That on the 20th day of December, 1913, the defendant served upon the plaintiff the following notice (Tr., 10):

> "You are hereby notified that the contractor will begin excavation December 22, 1913, for a pier for the new Main street bridge opposite property in which you are interested at the west end of the old bridge across the Wabash River at Lafayette, Indiana, the property being commonly known as 'Red Warf.'
>
> The excavation of this pier will necessarily have to go below the foundation of your building. This notice is given you in order that you may take steps to protect your property as far as possible.

Witness the seal of the Board of Commissioners of Tippecanoe County, State of Indiana.

GEORGE W. BAXTER,
Auditor Tippecanoe County, Indiana."

This paragraph proceeds (Tr., 9):

"The pier in question was constructed at its base 12 feet below low water mark 15 feet wide at its base by 75 feet long north and south, narrowing as it came up so that opposite plaintiffs' buildings it is 67 feet. The roadway of the new bridge is 40 feet wide with sidewalks eight feet in width on each side, thus reducing the width of the street to 56 feet, before it was 80 feet wide in front of plaintiffs' premises, and cut off the plaintiffs from the street or bridge by 12 feet. In addition the new bridge is nine feet higher than the levee or old street with a massive rail or fence of stone on the outer edge of the bridge on either side thereof, making the top of the rail 13 feet above the grade the street was before the new bridge was constructed."

Upon receiving the foregoing notice the plaintiffs did all they could to reduce the damages. Their buildings had been constructed of concrete and cement blocks and could not be removed. The highest and best bid they received for what could be removed was $25 and this the plaintiffs accepted. That as the work progressed large quantities of plaintiffs' soil caved into the excavation as the pit was sunk for the pier aforesaid, *and that the contractor then in order to protect his work and the lives of his employees entered upon the plaintiffs' premises and "broke up, destroyed and removed a portion of said concrete foundations."*

This first paragraph proceeds that the west bank of the Wabash River has been extended and excavated westerly; that the waters thereof have been turned in, upon and over the plaintiffs' lands and carry thereon vast quantities of water, sand, earth and debris, and wash away plaintiffs' soil; "that the Wabash River is widened at

said point;" that it was the design of the defendant in the construction of said new work to widen and provide for a larger and greater waterway for the Wabash River beneath its said new bridge, and that said bridge abutment was removed and said levee was removed that the water might have free passage under such new bridge.

Plaintiffs aver that by the construction of said new bridge and levee approach at its west end aforesaid, the highway existing for more than 20 years in front of and adjoining the plaintiffs' property and upon which it abutted has been destroyed and removed, and its soil excavated and carried away; that the plaintiffs owned the right and easement of all the support and protection against high waters of the Wabash River which plaintiffs' property had received, and of which plaintiffs and their grantors, immediate and remote, had been in possession for more than 20 years prior to September 9, 1913.

That plaintiff's easement and property rights in said highway, levee and abutment has been destroyed; that plaintiffs' land by the construction of said work by the defendant is overflowed and rendered of no value; that all ingress and egress of plaintiffs to and from said highway has been destroyed, and no ingress or egress can reasonably be provided for said plaintiff's property to said highway; that plaintiffs' property is now within the banks of the Wabash River caused by the construction of said works.

That plaintiffs' property immediately prior to the 9th day of September, 1913, was of the value of $12,000; that defendant, acting under its authority and power, has taken the same; that defendant has made to plaintiffs no payment or compensation therefor; that no proceedings or appropriation were begun or made by the

defendant for the *taking* of said property; that as aforesaid said highway and levee at the west end of said old bridge in front of and along the north side of plaintiffs' property was a street in the incorporated Town of West Lafayette; that no proceedings have been taken by said town for the change of the grade of said street, but that said defendant, acting under its statutory power and authority, has taken plaintiffs' property and easement in the construction of said bridge and its approach without making any compensation therefor, and thereby has injured and damaged plaintiffs' property to the extent of its entire value, to wit, $12,000, together with interest thereon from the 9th day of September, 1913. Wherefore the plaintiffs pray judgment for $13,000 and all other proper relief.

The second amended paragraph of complaint:

This paragraph sets up by way of estoppel (Tr., 13):

That in 1863 "the Main Street Bridge Company, an Indiana corporation, was incorporated for the purpose of building the aforesaid bridge and causeway and connecting "said bridge with said road leading westward from Lafayette." That on February 26, 1864, the Bridge Company acquired by condemnation proceedings from one Chauncey a strip of land 125 feet wide and 1,200 feet long on the west side of the Wabash River in the Town of Chauncey, now West Lafayette, through the bottom lands on which to construct a causeway or approach to this bridge. That $1,347 was paid for the land thus appropriated; that the bridge and causeway were completed by the bridge company and on October 24, 1871, in consideration of $27,000 conveyed by the Bridge Company by its warranty deed with all its privileges and appurtenances to the defendant the Board of Commissioners of Tippecanoe County, Indiana.

That but 80 feet of the 125 so acquired as aforesaid was used in making the causeway, it being only 40 on either side of the center line of the 125 feet. That on the 30th day of June, 1875, the defendant by its warranty deed, set out in full on page 14 of Transcript, conveyed the 22½ feet on the south side of the levee, highway or street aforesaid to William L. Martin in consideration of $50. This 22½ was part of Lots 52, 53 and 54 aforesaid. (Tr., 13, 14.)

> "And the plaintiffs aver that they derive their title from the said Chaunceys, the owners of the land so as aforesaid appropriated by said Main Street Bridge Company by successive conveyances down to said William L. Martin and from said Martin by successive conveyances by warranty deed to these plaintiffs.
>
> That these plaintiffs, and those under whom they claim up to the time of the filing of this complaint, have been in the open, notorious, uninterrupted and adverse possession of their said lands, under their claim of right through said conveyances for more than 20 years."

The second differs from the first in that (Tr., 15) it alleges:

> "That said approach to said bridge, causeway and levee at the west end of said bridge was on the 9th day of September, 1913, paved with asphalt, with cement curb and sidewalk."

The second is also stronger than the first, in that alleges what is undoubtedly the case (Tr., 20), "*that no ingress or egress can be provided for plaintiffs' property to said highway.*"

The second paragraph also differs from the first in that it alleges (Tr., 20) that the defendant has taken plaintiffs' property and easements, without instituting any proceedings to appropriate without authority of law and without making any compensation therefor.

In the first the allegation is the taking "was under the defendants' statutory authority" but without compensation.

To this amended complaint a demurrer was filed January 14, 1919.

The demurrer was general but accompanied by a memoranda of points as a late Indiana statute requires. In short it is a common law special demurrer,—inconsistent in reasons 11 and 13, *post* 12, and anomalous in that it attempts to set up new matter which even the Indiana statute does not sanction. But the statute forever afterwards limits them to the reasons assigned.

Demurrer (Tr., 21-24):

> "The defendant demurs to the complaint herein and for cause of demurrer says: That neither paragraph of complaint, separately and severally considered, state facts sufficient to constitute a cause of action.
>
> *Attorneys for Defendant.*"

Memo. with demurrer to amended complaint. Memoranda:

> "1. Neither paragraph of complaint alleges any negligent act on the part of the defendant, and, therefore, is not good as against demurrer on the theory that either paragraph of complaint sounds in tort.
>
> 2. Neither paragraph of complaint alleges any facts which show that there was any contractual duty on the part of the commissioners to pay the plaintiffs for their alleged damages.
>
> 3. No facts are alleged in either paragraph of complaint which show, or tend to show, that the plaintiffs are entitled to recover on the theory that any statutory liability exists by reason of, or on account of what it is alleged the commissioners did.
>
> 4. It affirmatively appears in both paragraphs of complaint that the defendant, in the building of the bridge and embankment or causeway, acted within the scope of its authority and under statu-

tory powers expressly conferred upon it, and, it also affirmatively appears in each paragraph of complaint, *that there was no physical taking of any of the property of the plaintiffs, or either of them, and the only alleged damages which appear are consequential damages which are held to be damnum absque injuria.*

5. It affirmatively appears in the second paragraph of complaint that the plaintiff's remote grantors were the owners of the real estate held by the plaintiffs as well as the real estate now covered by the street and highway, and, it also affirmatively appears that the land now used by the defendant county, in the construction of its bridge and causeway, was condemned by the defendant's immediate grantor, and that, therefore, the defendant county had not only an easement in the highway, but *were* in fact the owners of the fee, and that the plaintiff's grantors have received due compensation for the taking of such real estate as now used by the county by condemnation, and that any additional use of the real estate by the county would not be considered subjecting it to a new or additional servitude.

6. The allegations in the complaint that the plaintiffs had a special interest in the highway and had an easement for the purposes of ingress and egress, add nothing to the complaint. The plaintiffs could not acquire, as against the sovereign power, a special interest or easement which would preclude such sovereign power from exercising its duties or obligation to the public in maintaining its highways at all times in shape for use by the traveling public.

7. The defendant was under no legal obligation to maintain the old approach to the bridge because it incidentally afforded protection to the property of the plaintiffs, and they could acquire no prescriptive right or easement in such approach for such purpose.

8. The construction of a new bridge, and the approach or causeway, constructed as it was, higher and wider than the old one, was in effect but the raising of the grade of the traveled portion of the highway for which the law allows no damages to abutting owners.

9. The allegation in the second paragraph of complaint in reference to the plea of source of title would not create any liability against the county for the work done as alleged in the complaint, for the reason that the defendant county would not be bound by any covenants of warranty in the deed. Such covenants would be against public policy and would be in derogation of the rights of the public whom the Board of Commissioners represent. However, giving the matter its most favorable construction and due allowance for the effect of the warranty, no implied contract arises to pay additional damages to abutting land owners in the event of the raise of the grade or the widening of the bridge. *The defendant in the exercise of its governmental functions cannot be estopped from exercising the same either by contract, laches, or prescription.*

10. It is shown by the allegation in each paragraph of complaint that the real estate owned by the plaintiff was what is known as 'bottom lands,' and was so located by nature as it might be subjected to overflow of water from the Wabash River and the plaintiffs had no right to rely upon the fact that the bridge and its approaches thereto would always remain the same, and they took title to the property charged with the knowledge that such bridge and its approaches might be changed, if the shifting conditions brought about by the improvement of the surrounding country demanded it to be changed. Their construction of the small house on the abutting land could not obstruct the improvement such as progress of the times might require.

11. The Town of West Lafayette, and the City of Lafayette, Indiana, by express provision of the statute, have sole jurisdiction over the bridge described in the complaint, and the approaches thereto, and the defendant acted only as the agent of such municipal corporations in drawing the specifications, making the contract and in the construction of the work, and if the plaintiffs had otherwise stated facts sufficient to create a liability such liability would be against such municipal corporations rather than against this defendant.

12. The defendant in this action is not liable to the plaintiffs as abutting land owners for changes in

the grade to the approach of the bridge built, nor in widening the bridge within the municipal corporations, unless it did so without authority of law, and in a careless and negligent manner, *or unless such liability is fixed upon the defendant by the Constitution or some provision of the statute.* No such liability is shown by any allegation of either paragraph of complaint.

13. The statute expressly confers upon boards of county commissioners, authority to build bridges costing over five hundred dollars within the corporate limits of cities and towns. It, therefore, casts upon such boards a discretionary power as to the manner in which such approaches and bridges should be built, and the board of commissioners are not liable for damages in discharging their discretionary duty, unless there is a gross abuse of such discretion. Allegations in the complaint that the defendant was proceeding to excavate upon the highway without making provision for the protection of the soil of plaintiff's land and thereby taking away its lateral support adds nothing to the complaint as the damages, if any, for such conduct, were consequential for which the law affords no recovery.

14. It is presumed, in the absence of counter-vailing facts alleged in the complaint, that the defendant county acted with due care and fully within the scope of its authority in making all of the improvements alleged in the complaint.

15. The complaint in each paragraph discloses that in the year 1913, the Wabash River rose to a point higher than it had ever been known to rise before. As alleged in the complaint higher than has been known in a period of 'Time to which the memory of man runneth not to the contrary.' And this flood and freshet had washed out one of the piers of the bridge from which it affirmatively appears that it was the duty of the commissioners to either replace the bridge in its original condition where it might again be washed out, to be repaired again at the expense of many thousands of dollars to the county, or whether it should, in the exercise of its discretion build a new bridge, widen the same, raise the surface of the approach or causeway, so as to

afford protection to the highway under any conditions that might arise.

It would seem from a reading of these paragraphs that the action of the commissioners should be commended, rather than condemned by suing them for

Attorneys for Defendant."

January 16, 1919, this demurrer was sustained. The plaintiffs excepted and refusing to plead further there was a judgment for the defendant. (Tr. 25.)

The new matter alleged in reasons 10 and 15 not only emphasize a capricious will in defiance of the due process clause or clause 2 of section 1 of the 14th amendment, but in connection with reasons 6, 7, 9 and 13 avows defiance of the "contract clause," or the first clause of section 10 of article 1 of the Constitution of the United States and present Federal questions right on the face of the record.

Yazoo R. R. Co. v. *Adams*, 180 U. S. 11.

Constitutional questions being involved, as plaintiffs in error conceived it an appeal, the only method of review in Indiana, except hereinafter shown, was prayed and allowed by the trial Judge Henry Vinton, of long and varied experience on this *nisi pruis* bench to the Supreme Court of Indiana. (Tr., 24-25.)

Section 1392, Burn's Revision 1914.

Ex Parte France, 176 Ind. 72.

After the appeal had been perfected and the appellants, the plaintiffs in errors printed brief filed, the appellee by its counsel, after avowing that the Indiana Supreme Court had jurisdiction of the cause, on the 21st day of July, 1919, asked for 45 days in which to prepare and file a brief, it then had until August 10 under the rules, because of the amount involved, $13,000, and the large number of authorities cited "involving a large array of decisions from the different States of the Union,

cluding many decisions of the United States Supreme ourt."

Notwithstanding the Supreme Court (Tr., 31) "on ıly 22, 1919 (Tr., 31) "on its own motion transfers the ıove entitled cause to the Appellate Court, No. 10632 r want of jurisdiction."

The Appellate Court of Indiana on the same day grant- the appellee, the defendant in error here, the addi- ınal time requested in which to prepare and file the ief. (Tr., 31.) And in due time—after a reply brief d oral argument before the entire Appellate bench con- sting of six judges, ordinarily that court set in two anches or divisions of three judges each,—that court June 10, 1921 (Tr., 32), affirmed the judgment below. Judge Enlowe, with Judges Remery, Bateman and Mc- ahon concurring, wrote the opinion of the court. (Tr., to 41.) Judge Daushman concurred in a separate inion.

However, it may be on the face of the record and in briefs, Judge Nichols in his dissenting opinion cer- inly raised constitutional questions under the second use of the first section of the 14th amendment, and first clause of the 10th section of article 1 of the Con- tution of the United States, for he manifestly had in nd section 21 as amended by the 14th amendment and prohibition against impairing the obligation of con- cts.

Judge Nichols opinion is at pages 43 to 53 of the tran- ipt.

On page 46 he goes into the obligation of the deed "the ntract." For as he says on page 46 of the transcript:

> "It would be a strange doctrine indeed that could permit a grantor whether public or private holder, to convey real estate abutting upon a highway, which location must of necessity enhance its value, by giv-

ing its grantee the means of ingress and egress to his property, and thereafter the same grantor could by his own act ruthlessly destroy such ingress and egress without compensation to the grantee."

On the question of compensation Judge Nichols says, on page 51:

"In the case of *Pompelly* v. *Green Bay Company*, 13 Wallace 166, from the Supreme Court of the United States, where the court in discussing a like constitutional provision of the State of Wisconsin to the one here involved, with interpretation that protects the citizen's private rights, says: 'It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the use of the public, it can destroy its value entirely, can inflict irreparable, and permanent injury to any extent, can, in effect, subject it to a total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use. Such construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at common law, instead of the government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.'

(Tr., 52 and 53.)

When I consider that along with the destruction of the means of ingress and egress there was in this case a destruction of the property from which there had been an ingress and egress, thereby totally annihilating appellants' property rights, I must say that it would be strange reasoning indeed that would

undertake to justify such an invasion without compensation by the government, of the private rights of one of its citizens, even though such an invasion be in the exercise of police power.

I have already quoted from *Pumpelly* v. *Green Bay, etc., Co.*, 13 Wallace, 166, but before closing this dissenting opinion I must again advert to that opinion. On page 180, Miller, J., says: 'We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decision of the courts of those States. But we are of the opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle.'

(Tr., 53.)

I am pleased to declare myself in harmony with this clear expression of judicial acumen, and for the purposes of this opinion to emphasize that part of it that opines that the decisions holding no redress, have gone to the uttermost limit of sound judicial construction in favor of the principle, and to assert that the majority opinion in this case is among the cases that have gone beyond it.

These are troublous times, when enemies from without and from within, taking advantage of the turmoil of war and its aftermath, would strike down

our American Constitutions, *both Federal and State.*"

The opinion of the court said (Tr., 35):

> "That the appellants have suffered damage in the matter of this property is without question, but the nature of this damage, whether direct or simply consequential, is the matter we must now consider.
>
> The answer to the question presented as we view it, depends upon the validity of the claim of appellant to a property right in and to the said embankment, and to a way of egress and ingress across said sidewalk. *If appellants had any property right of egress and ingress* as against the appellee, in and to said sidewalk that right was taken from them. If on the other hand the appellants had no such rights as those claimed, then that provision of our constitution relative to the taking of private property for public purposes, can, as we view it, have no application to the facts of this case, and the damages sustained by appellants are simply consequential."

The concurring opinion of Judge Dausman emphasizes the erroneous conclusions of the opinion of the court, that the plaintiffs in error had no property whether in fee by way of easement or right of egress and ingress to and from "Third street" and that the damages were consequential.

Of course if the plaintiffs had no property there were no damages, not even consequential.

Judge Dausman stated in his opinion (Tr., 42):

> "I am of the opinion that the averments of the complaint show a taking of private property for a public use and that plaintiff is entitled to the protection afforded by section 21, article 1 of the constitution."

Although Judge Dausman shows that boards of county commissioners are corporations under the Indiana statutes, with the power to sue and be sued, he concurs with his brethern *because the plaintiffs have mistaken their*

remedy, "but I am unable to concur in the reasoning by which that result is reached."

After a petition for a rehearing was overruled (Tr., 55) the plaintiff in error as the statute, Burns Statutes, 1914, sections 1392 and 1394, and the practice of the Supreme Court of Indiana—*Saunders* v. *State*, 85 Ind. 318—in such cases made and provided (Tr., 55) on November 3, 1921, moved to vacate the order of July 22, 1919, transferring the cause to the Appellate Court or in the alternative, for a writ of error *coram nobis* directed to the Appellate Court because among others for the following reasons:

(Tr., 57-59.)

"5. The appellees in their brief make the point that the Constitution of Indiana, section 21 of article 1, is different from the constitutions of most states in that it does not provide that a land owner or abutting property owner may recover consequential damages no matter how great those damages may be by reason of a municipality interfering with the enjoyment of his property by reason of a change in the location or change in the grade of the street. This brings up the question whether or not as presented by the dissenting opinion of Judge Nichols that the constitutional provision of Indiana is not in violation of the second clause of the first section of the 14th Amendment to the Constitution, which provides:

'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.'

In the Civil Rights case 109 U. S. 3, Justice Bradley in writing the opinion of the court upholds his views in the *Slaughter House* cases, 16 Wallace, viz., page 23:

"Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not,

in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law.

6. This section of the 14th Amendment was adopted for the very purpose of correcting injustice such as counsel point out prevails in the Indiana Constitution as well as its laws, and the constitution and laws of other states at the time of the adoption of the 14th Amendment.

Wherefore these appellants charge that section 21 of article 1 of the Constitution of the State of Indiana is in violation of section 2, clause 1, of the 14th Amendment of the Constitution of the United States in that it provides as construed by the Appellate Court in this case, that the plaintiff's property may be damaged or taken without due process of law.

7. Appellants say that the judgment of affirmance of Appellate Court in the above entitled cause is contrary to the second clause of section 1 of the 14th Amendment in that it operated to deprive the appellants of a privilege long enjoyed by them, namely: that of free ingress and egress to and from their property or buildings and the embankment constituting the street or highway and being the continuation of Main street of the City of La Fayette, Ind.

8. * * * But however this may be the order of July 22, 1919, and the third section of section 1394, and the fourteenth section of section 1392 of Burns Statutes 1914, are unconstitutional under the equal protection clause of the 14th Amendment, in that they allow a review by this court or a transfer to this court in a case where there is damages which are assessed by way of a judgment amount to more than $6,000, but allow no review or transfer to this court, where the damages are avowed to be of the same or a greater amount but there is no judgment. The party whose property is damaged is not allowed an appeal or transfer while the party who does the damage is allowed an appeal or transfer to this court."

9. And appellants say that having properly perfected their appeal to this Honorable court, according to law, they can in nowise be debarred, estopped and denied their right to have their said cause reviewed, which they now demand as a constitutional

right to enforce a constitutional guaranty, because of any mistake or action of this Honorable court.

Section 4, Article 7, of the Constitution of Indiana, *Chapman* v. *Wintrooth*, 252 U. S. 126, at pp. 136 and 137.

As was said by the Supreme Court of the United States in *Virginia* v. *Rives*, 100 U. S. 313, p. 319, it was a case of a violation of the constitutional provision after getting into the trial of the Appellate Court."

On the same day, November 3, 1921, and by reference o the foregoing motion and petition for the writ of error he plaintiffs in error filed their "Petition to Transer," the cause from the Appellate Court to the Supreme Court of Indiana. (Tr., 60 to 66.)

This is the usual statutory method for the Supreme Court of Indiana to review the judgment of the Indiana Appellate Court. (Sec. 1394, Burns Statutes 1914.)

In addition to the constitutional questions presented t was set up (Tr., 61) that never by any court in the land, ertainly not by the Supreme Court of Indiana had damges been denied in a case similar to that at the bar, and hat the deed of the defendant in error of 1875 estopped hem from claiming under the condemnation of 1871.

The Supreme Court of Indiana on the 10th day of Janary, 1922, overruled the petition to transfer and on he 25th day of January, 1922, overruled the motion to acate the order of July 22, 1919, and for a writ of error *oram nobis* with exceptions.

Thereupon the plaintiffs in error presented to the chief ustices of the Supreme Court of Indiana their petition or a writ of error to the Supreme Court of the United States and their assignment of errors. (Tr., 67 to 73.)

The writ of error was allowed. (Tr., 75.)

"ASSIGNMENT OF ERRORS.

Transcript 70.

1. The court erred in holding that section 21 of the bill of rights of the Constitution of the State of Indiana, being Section 66 of Burns' Statutes of 1914 of Indiana, was not invalid under the second clause of the first section of the 14th amendment to the Constitution of the United States.

2. The second clause of the 14th amendment of the Constitution of the United States operated to write into section 21 of the bill of rights of the Constitution of the State of Indiana the word 'injured,' and the courts of Indiana, to-wit: the Superior Court of Tippecanoe County, Indiana, the Appellate Court of Indiana and the Supreme Court of Indiana erred in not holding said section 21 so amended.

3. The plaintiffs in error say that the sole question involved in the transcript is the construction of the word 'taking' in section 21 of the bill of rights of the Constitution of the State of Indiana, and that while the courts of Indiana, *nisi prius* and appellate might have been right in construing said word as excluding the word 'injury,' notwithstanding the construction by the Supreme Court of the United States in the case of *Pompelly* v. *Green Bay Company*, 13 Wal. 166, on pages 177-178, of the word 'taking,' although the plaintiff in error apprehends and charges that the courts of Indiana should have followed the construction of the Supreme Court of the United States aforesaid, the plaintiff in error says that after the adoption of the 14th Amendment to the Constitution of the United States the Courts of Indiana were bound to follow the construction of the word 'taken' as laid down by the Supreme Court of the United States and erred in not so doing, as appears by the transcript in this cause.

4. The Superior Court of Tippecanoe County erred in construing the word 'taking' in said section in that it did not construe said section according to the construction put upon said word in the case of *Pompelly* v. *Green Bay Company*, in 13 Wallace, 166 on pages 177 and 178.

5. The Superior Court of Tippecano County erred in holding that the plaintiff in error's damages were

damnum absque injuria—and in entering judgment of June 16, 1919.

6. The Supreme Court of Indiana erred by its order of July 22, 1919, in transferring said case to the Appellate Court of Indiana, because there was no constitutional question involved in the record in said cause.

7. The Appellate Court of Indiana erred in construing the word 'taking' in section 21 of the bill of rights in the Constitution of the State of Indiana.

8. The Appellate Court erred in construing the word 'taking' in section 21 of the bill of rights in the Constitution of the State of Indiana contrary to the construction put on said word by the Supreme Court of the United States in the case of *Pompelly* v. *Green Bay Company*, 13 Wallace, 166, on pages 177, 178.

9. The Appellate Court of Indiana erred in not holding section 21 of the Indiana bill of rights invalid under the second clause of the first section of the 14th amendment to the Constitution of the United States.

10. The Supreme Court of Indiana erred in holding that section 21 of the bill of rights of the Constitution of the State of Indiana, as construed by the Superior Court of Tippecanoe County, Indiana and the Appellate Court, was not invalid under the second clause of the first section of the 14th amendment of the Constitution of the United States.

11. The Superior Court of Tippecanoe County, Indiana, the Appellate Court of Indiana and the Supreme Court of Indiana erred in holding that the action of the Board of Commissioners did not deprive the plaintiffs in error of their property without due process of law.

12. That the Supreme Court of Indiana erred in entering its order or judgment of January 10, 1922, in refusing to transfer said cause from the Appellate Court to the Supreme Court.

13. That the Supreme Court of Indiana erred in entering its order of January 25, 1922, in refusing to vacate its order of July 22, 1919, and refusing to grant the plaintiffs in error right and justice under the first section of the 14th amendment of the Constitution of the United States.

14. The Supreme Court of Indiana erred in holding that the third section of section 1392 of Burn's Statutes of Indiana of 1914, and the 14th section of Section 1392 thereof are not invalid under the second clause of the first section of the 14th amendment to the Constitution of the United States in that they denied to the plaintiff in error the equal protection of the law, in that they allow a review by the Supreme Court of the State of Indiana in a case where there are damages which are assessed by way of a judgment to the amount of $6,000 or more, but allow no review by the Supreme Court of Indiana, where the damages are acknowledged to be greater, but there is no award, and a judgment for said damages is denied the injured party.

15. Plaintiffs in error further say that the action of the Board of Commissioners of Tippecanoe County aforesaid is repugnant to and in conflict with article 14, section 1 of the Constitution of the United States which says, that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law.'

16. Plaintiffs in error further say that the judgment of the Superior Court of Tippecanoe County, Indiana, aforesaid is repugnant to and in conflict with article 14, section 1 of the Constitution of the United States which says, that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law.'

17. Plaintiffs in error further say that the decision of the Appellate Court of the State of Indiana, aforesaid is repugnant to and in conflict with article 14, section 1 of the Constitution of the United States which says, that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law.'

18. Plaintiffs in error further say that the judgment of the Supreme Court of the State of Indiana, aforesaid is repugnant to and in conflict with article

14, section 1 of the Constitution of the United States which says, that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law.'

Wherefore the said William Randall and George S. Akers pray that the judgment of the Appellate Court of Indiana be held void and for naught and reversed, and that the judgment of the Superior Court of Tippecanoe County, Indiana, be held void and for naught and reversed, and that they be granted right and justice in the cause."

BRIEF.

I.

THE INDIANA COURTS AND JUDGES, EXCEPTING JUDGE NICHOLS, ERRED IN CONSTRUING THE WORD "TAKEN" IN SECTION 21, OF THE INDIANA CONSTITUTION AND IN SO DOING RENDERED THAT SECTION INVALID UNDER THE "DUE PROCESS" OR THE SECOND CLAUSE OF THE FIRST SECTION OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES—AND THE QUESTION AROSE ON THE FACE OF THE PLAINTIFF'S IN ERROR AMENDED COMPLAINT IN THE SUPERIOR COURT OF TIPPECANOE COUNTY, INDIANA, IT CAME UP UNDER JUDGE NICHOLS' DISSENTING OPINION AND THE PLAINTIFFS IN ERROR'S MOTION TO VACATE THE ORDER OF THE SUPREME COURT OF INDIANA OF JULY 22, 1919, AND FOR A WRIT OF ERROR CORAM NOBIS FROM THE SUPREME COURT OF INDIANA (TR., 56), AND THE PETITION TO TRANSFER THE CAUSE FROM THE INDIANA APPELLATE COURT TO THE SUPREME COURT OF INDIANA. (TR., 60.)

Assuming that there was not actual entry and direct injury to plaintiffs in error properly—that the injury was indirect or "consequential," plaintiffs in error contended from the beginning (3d, 4th and 5th assignment of errors, Tr., 71; *Ante*, p. 22) that the construction this court puts on the word "taken" in construing a similar provision of the Constitution of Wisconsin in the case of *Pumpelly* v. *Green Bay Company*, 13 Wallace 166, on pages 177, 178, should govern.

Especially should this construction obtain since the second clause of the first section of the 14th amendment, viz.:

> "No state shall make or enforce any law which shall abridge the privideges or immunities of citizens

of the United States; nor shall any state deprive any person of life, liberty, or property, without due proc ess of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 21 of the Indiana Constitution of 1850 appears as follows as section 66 of Burns Indiana Statutes of 1914:

"No man's property shall be *taken* by law, without just compensation, nor except in the case of the state without such compensation first assessed and tendered. No man's particular services shall be deemed without just compensation."

In 1897 the Supreme Court of Indiana as then consituted in the *City of Fort Wayne* v. *Fort Wayne & Jackson Railroad Company,* 149 Ind. 25, expressly held that the second cause of the first section of the 14th amendment is part of section 21. Indeed this decision, as the previous decision had struck out article 13, the proslavery clauses of the Indiana Constitution, struck out of section 21 the words "nor except in the case of the State," for it says the individual's property shall not be taken by the City of Fort Wayne without compensation first ascertained in court after due notice, and proper proceeding that is "due process of law."

This decision is based in part on a section—262—of Elliott on Roads and Streets, 3d Ed., in which it is set forth that under the "due process clause of the 14th amendment a statute that fails to provide compensation and a hearing after notice as a condition precedent to a taking of private property for a public purpose is invalid." The author of this work was a member of the Indiana Supreme Court as early as 1881.

In support of his text Judge Elliott cites:

Campbell v. *Dwiggins,* 83 Ind. 473.

Scott v. *City of Toledo,* 36 F. R. 385.

An opinion of Circuit Judge Jackson, afterwards an associate justice of the Supreme Court of the United States.

Taylor on "Due Process" holds there must be compensation to bring the taking of private property within that provision of the 14th amendment, citing:

C., B. & Q. R. R. Co. v. *Chicago,* 166 U. S. 226 at 235-241.

Norwood v. *Baker,* 172 U. S. 268.

Right under these decisions and principles therein set forth was the amended complaint drawn and especially was the following allegations made (Tr., 12, 20; *ante* 7):

> "That plaintiff's property immediately prior to the 9th day of September, 1913, was of the value of $12,000, that defendant acting under its authority and power has taken the same; that defendant has made the plaintiff no payment or compensation therefor; that no proceedings or appropriations were begun or made by the defendant for the taking of such property; that as aforesaid highway and levee at the west end of said old bridge in front of and along the north side of plaintiff's property was a street in the incorporated town of West Lafayette; that no proceedings have been taken by said town for the change of the grade of said street, but that the said defedant acting under its statutory power and authority has taken the plaintiff's property and easement in the construction of said bridge and its approach without making any compensation therefor, and thereby has injured and damaged plaintiff's property to the extent of the entire value, to-wit, $12,000."

Indiana was one of the first states to adopt the principles that became the 14th amendment under the act of Congress of April 9, 1866, and the 13th amendment, *Smith* v. *Moody,* 26 Ind. 299, decided in 1866, wiped article 13 out of the present or Indiana constitution of 1850.

Article XIII.

"Section 1. No negro or mulatto shall come into or settle in the state after the adoption of this constitution.

Sec. 2. All contracts made with any negro or mulatto coming into the state contrary to the foregoing section shall be void; and any person who shall employ such negro or mulatto, or otherwise encourage him to remain in the state, shall be fined in any sum not less than $10 nor more than $500."

The 14th amendment the Indiana court held in 1871 in *State* v. *Gibson*, 36 Ind. 389, authorized and validated all kinds of contracts between black and whites except a contract of marriage.

II.

THE WARRANTY DEED OF JUNE 30, 1875, BY THE DEFENDANTS IN ERROR TO THE GRANTOR OF THE PLAINTIFF IN ERROR TO THE 22½ FEET ABUTTING ON MAIN STREET IS A CONTRACT WHICH THE DEFENDANT IN ERROR CANNOT IMPAIR, EVEN IF SO DOING THE DEFENDANT IN ERROR BE CONSIDERED THE STATE,—UNDER CLAUSE 1 OF SECTION 16 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES, VIZ., "NO STATE SHALL PASS ANY LAW IMPAIRING THE OBLIGATION OF A CONTRACT."

A deed or grant is a contract this court ruled in 1810 in *Fletcher* v. *Peck*, 6 Cranch 87 p. 137.

The error appears right at the face of the amended complaint setting up the deed from the defendant in error (Trans., 14) and the claims advanced in the 6th, 9th, 13th and 15th grounds of demurrer (Trans., 22-24; *ante*, p. 11) from the language of Judge Dausman's concurring opinion *ante* 18 and from the language of Judge Nichols' dissenting opinion *ante* 15.

Yazoo Railroad Co. v. *Adams*, 180 U. S. 1.

On page (Trans., 23) and *ante* p. 12 in the 9th ground of demurrer in the following: "*The defendant in the exer-*

cise of its governmental functions cannot be estopped from exercising the same either by contract, laches, or prescription.

The word warranty in the deed of the defendant in error embraced all the common law covenants.

Section 3958 Burn's Statutes, 1914.

Manifestly the conveyance of June 30, 1875, was made to enable the grantee egress and ingress to and from Third street and the bridge.

III.

THE FEE TO A STREET IN INDIANA IS IN THE ABUTTING PROPRIETOR. AND OF THIS HE CANNOT BE DEPRIVED OF EVEN BY THE STATE WITHOUT COMPENSATION.

Cox v. *Railroad*, 48 Ind. 178.
Railroad v. *Scott*, 74 Ind. 29.
Railroad Co. v. *Rodel*, 89 Ind. 128.
City v. *Kingsbury*, 101 Ind. 200.

The conveyance of a lot adjoining a street carries a fee to the center of the street, unless the deed specially provides otherwise.

Cox v. *Railroad Co.*, 58 Ind. 178.
Railroad Co. v. *Scott*, 74 Ind. 29.

In *City* v. *Kingbury*, *supra*, on page 211:

> "The conveyance of lots bounded on a public way conveys the fee to the grantee to the center of the street. *Terre Haute R. R. Co.* v. *Rodel*, 89 Ind. 128; 2 Dillon Municipal Corp. (3d Ed.) p. 623, auth. n. *Such a conveyance rests in the grantee a right as an abutter of which the state itself can not divest him, except upon the payment of just compensation assessed according to law.*"

Citing in its support the following Indiana cases:

State v. *Berdetta*, 73 Ind. 185.
Common Council v. *Croes*, 7 Ind. 9.

Hayes v. *Thomas*, 7 Ind. 38.
Tate v. *O. M. R. R.*, 7 Ind. 479.
Protzman v. *Railroad Co.*, 9 Ind. 467.
Cummins v. *City of Seymour*, 79 Ind. 491.
Ross v. *Thompson*, 78 Ind. 90, 94.

The city only has an easement.

Conner v. *New Albany*, 1 Blackford 43, and cases *supra*.

IV.

THE LOT OWNER IN INDIANA NOT ONLY HAS THE FEE TO THE CENTER OF THE STREET BUT AN EASEMENT OR RIGHT IN THE STREET "A PRIVATE RIGHT DISTINCT FROM THE CLAIM OF THE PUBLIC, WHICH EVEN THE LEGISLATURE CANNOT TAKE AWAY.

This is a right and rule of property that has existed in Indiana from the earliest day, 1819. *Conner* v. *New Albany*, 1 Blackford 43, and down to the present time as Judge Nichols shows by his dissenting opinion on pages 47 and 48 of the transcript.

He cites the following cases:

The Town of Rensselaer v. *Leopold*, 106 Ind. 29.
Haslett v. *The New Albany & R. R. Co.*, 7 Ind. App. 603.
Protzman v. *Indlps. R. R. Co.*, 9 Ind. 467.
Hayes v. *Thomas*, 7 Ind. 38.
Indlps. & Co. v. *Smith*, 52 Ind. 428.
Danzer v. *Indlps. & R. R. Co.*, 141 Ind. 604.
Oler v. *Pittsburgh & R. R. Co.*, 184 Ind. 431.

V.

UNDER THE MORTMAIN ACTS THE MAIN STREET BRIDGE COMPANY COULD ONLY TAKE AN EASEMENT.

The first section of the revision of the Statutes of 1852 under the Constitution of 1850 now Section 4 of Sec-

tion 236 of the Revised Statutes of 1914, Burns is as follows:

The law governing this state is declared to be:

> "Fourth. The common law of England and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seven Henry the Eighth), and which are of a general nature, not local to that kingdom, and not inconsistent with the first, second and third specifications of this section."

The first specification is: "The constitution of the United States and of this state."

A corporation in Indiana only acquires so much land in quantity and title as may be necessary to enable it to perform the function for which it was incorporated, and this too, whether the acquisition be by grant or condemnation.

> *Railway Co.* v. *Geissel*, 119 Ind. 77.
>
> *Chicago Ry. Co.* v. *Hunchen*, 130 Ind. 529.
>
> *Consumers Gas Co.* v. *American Gas Co.*, 162 Ind. 393.

Chapter 29 of Burns Revision of the Indiana Statutes of 1914, provides for the organization of bridge companies. Sections 4383, 4384, provide that such companies may condemn.

"4383. (4646 *May take property.*—14. Any corporation under the provisions of this act shall be capable of purchasing, holding, using and conveying any property or estate, real or personal, *that may be deemed necesasry for the erection of any bridge, causeway,* toll-house and all other appropriate purposes, and to take real property therefor. Such corporation may have the benefit of the writ of assessment of damages.

4384. (4647.) *Writ of assessment of damages.*—15. Such corporation may file an application for such writ of assessment of damages in the Circuit Court, or, in

vacation, in the office of the clerk thereof, setting forth the precise description of the real estate desired to be taken, the names of the persons, interested therein, making them defendants, and the purposes to which the same is to be converted, and refer to the law which authorizes the taking of the property. The clerk shall issue thereupon to the sheriff a writ of assessment of damages, reciting therein the material part of the application, and directing the sheriff to assess the damages by a jury.

Aside from the fact that under this statute only the condemning party can have the benefit of this statute, it explains why the conveyance of June 30, 1875, was made.

Of course if the bridge company acquired a fee it conveyed a fee to plaintiff's grantor."

VI.

THE DEFENDANT IN ERROR IS ESTOPPED BY ITS DEED OF JUNE 30, 1875.

The American doctrine is that the state should keep faith with individuals and that it may be estopped by deed or matter *in pais*.

State v. *Bailey*, 19 Ind. 452.

Commonwealth v. *Pejepscut Proprietors*, 10 Mass. 155 (1813).

Commonwealth v. *Andrew*, 3 Pick., 20 Mass. 224.

People v. *Society*, 2 Paine 545.

People v. *Maynard*, 15 Mich. 463.

Cohn v. *Barnes*, 7 Sawyer 48.

Fletcher v. *Peck*, 6 Chranch 87, p. 187, when in speaking of a deed of the State of Georgia this court said: "*A party is, therefore always estopped by his own deed.*"

Woodruff v. *Trapnall*, 10 How. 190.

United States v. *Willamette V. & C. U. Plank R. Co.*, 54 Fed. Rep. 807 at p. 811.

State v. *Jackson*, 69 F. R. 116, 123.

In *West* v. *Wright*, 98 Ind. 335, p. 341, the Indiana Supreme Court said:

> "It is true I lied to you * * * I am entitled to the fruits of my falsehood and cunning and you are without remedy. But 'No' said the court, citing:
>
> *Dodge* v. *Pope*, 93 Ind. 480.
>
> *Campbell* v. *Frankem*, 65 Ind. 591.

There need be no fraudulent purpose at the start.

An estoppel may arise where there is no previous formed design to defraud, for the fraud which the law condemns consists in denying a representation upon which another has acted and the repudiation of which will entail loss upon him.

Wiechart v. *Hedrick*, 118 Ind. 341.

Ward v. *Berkshire L. Ins. Co.*, 108 Ind. 301.

Mason v. *Lane*, 124 Ind. 592.

VII.

THE STATE SHOULD KEEP FAITH.

Fletcher v. *Peck*, 6 Chanch 87, on page 132:

> "The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered a mere act of power, which must find its vindication in a train of reasoning not often heard in courts of justice."

In *Woodruff* v. *Trapnall*, 10 How. 190, p. 207:

> "We naturally look to the action of a sovereign state, to be characterized by a more scrupulous regard to justice, and a higher morality than belong to the ordinary transactions of individuals. The obligation of the State of Arkansas to receive the notes of the bank, in payment of its debts, is much stronger than in the above case of individual guaranty."

In *United States* v. *Willamette Valley Wagon R. Co.*, 54 F. R. 807 at p. 811, it is said:

> "No good reason can be offered why the United States, in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience."

VIII.

THE MAJORITY OPINION MISINTERPRETED THE CASE OF THE NORTHERN TRANSPORTATION CO. V. THE CITY OF CHICAGO, 99 U. S. 635. INDEED THE MAJORITY OPINION MISAPPLIES THE ILLINOIS CASES.

In *Transportation Company* v. *Chicago, supra,* the plaintiff was a steamboat line running boats from Chicago to Ogdensburg, N. Y., with a certain lot in Chicago on the Chicago River, with a dock and wharfing rights and privileges. In constructing a tunnel under the river along the line of LaSalle street the navigation of the river was *temporarily obstructed* by a coffer-dam in front of the dock. It was in the river less than one year. It did not entirely exclude the steamboat line from its dock. Under this state of facts the damages in the case—trespass on the case—were left to the jury under proper instructions says this court and there was a verdict for the defendant.

Not a syllable in the case about an abutting lot owners right in a street even in Illinois. But the Illinois law does not control.

IX.

THE 15TH ASSIGNMENT OF ERROR, ANTE P. 24, CHALLENGES UNDER THE FIRST SECTION OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, AND ESPECIALLY THE DUE PROCESS CLAUSE THEREOF, THE ACTION OF THE DEFENDANT IN ERROR, THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, UNDER ITS CLAIMED STATUTORY AUTHORITY AS SET UP IN THE 12TH AND 13TH GROUNDS OF DEMURRER, ANTE P. 12, IN "TAKING" APPROPRIATING PLAINTIFFS IN ERROR'S PREMISES WITHOUT COMPENSATION. AND THE GOOD FAITH OF THE DEFENDANT IN ERROR IN NARROWING MAIN STREET IN FRONT OF THESE IDENTICAL PREMISES.

That the board of commissioners recognized one of the elements of "due process is manifest from its notice served upon the plaintiffs in error set up in both paragraphs of the complaint (Trans., 10 and 19) and which was as follows:

LaFayette, Ind., Dec. 20, 1913.

You are hereby notified that the contracter will begin excavation December 22, 1913, for a pier for the new Main street bridge opposite property in which you are interested at the west end of the old bridge across the Wabash River at LaFayette, Indiana, this property being commonly known as "Red Wharf."

The excavation for this pier will necessarily have to go below the foundation of your building, this notice is given you in order that you may take steps to protect your property as far as possible.

Witness the seal of the Board of Commissioners of Tippecanoe County, State of Indiana.

GEO. W. BAXTER,
Auditor of Tippecanoe County, Illinois.

But notice is not enough as appears *ante* p. 28 to justify an appropriation or injury of private property. There must be compensation also.

In 1857 the Supreme Court of Indiana in *Evansville & Crawfordsville R. R. Co.* v. *Deck*, 9 Ind. 433, has held the word "taken" in Section 21, was synonymous with "siezed" "*injured*" "destroyed" * * *

The second assignment of error, *ante* p. 22, squarely presents this question.

The 11th, 16th, 17th and 18th assignment of errors preserve this challenge as to the action of the Superior Court of Tippecanoe County, the Appellate and Supreme Court of Indiana in ratifying and confirming the action of the Board of Commissioners of Tippecanoe County.

X.

THE 14TH AND THE 6TH ASSIGNMENTS OF ERROR CHALLENGES THE ACTION OF THE SUPREME COURT AND THE VALIDITY OF THE STATUTES—3D SECTION OF SECTION 1392 OF BURN'S STATUTES OF 1914—IN TRANSFERRING THE CAUSE TO THE APPELLATE COURT OF INDIANA AFTER THE CAUSE HAD BEEN DOCKETED IN THE SUPREME COURT OF INDIANA UNDER THE CLAIM THE PLAINTIFFS IN ERROR'S CONSTITUTIONAL RIGHTS HAD BEEN VIOLATED.

Burns Annotated Statutes of 1914, 1392 Supreme Court Appeals to—

Hereafter all appeals in appealable cases in the following cases shall be taken directly to the Supreme Court viz:

First. All cases in which there is a question, and such question is duly presented, either * * *, or the constitutionality of a statute, state or federal, or the rights guaranteed by the state or federal constitution.

Fourteenth. All cases wherein the amount of money in controversy exclusive of interest and costs, on the judgment of the trial court exceeds $6,000.

XI.

THE SUIT IS PROPERLY BROUGHT.

Article 10, Section 6 of the Indiana Constitution provides for Boards of County Commissioners. Under this section the legislature has declared (Burns Anno. Statutes 1914, Section 5974:

> "Such commissioners shall be considered a body corporate and politic by the name and style of the Board of Commissioners of the County of .....; and as such, and in such name, may prosecute and defend suits, and have all other duties, rights and powers incident to corporations."

While the Commissioners are a court, as Judge Dausman shows, in his concurring opinion Tr., 42, they could not under the due process clause of the 14th, and even under the Indiana system prior to that amendment, be a judge in their own case without the consent of plaintiff in error.

The plaintiffs in error did what the Indiana law authorized—brought their suit or action as it may be, in a court of competent jurisdiction.

Gaston v. *The Board of Commissioners of Marion County, Indiana*, 3 Ind. 497.

Here it was held the Commissioners were an agent of the county in taking the property.

An Indiana court can appoint an attorney to defend a pauper but cannot in the order fix the attorney's compensation. And this, too, although the judge who employs the counsel is the agent of the State.

Webb v. *Band*, 6 Ind. 13.

The judge cannot order the attorney to serve without compensation.

Blyth v. *The State*, 4 Ind. 525.

The Assessment of Damages Act, Burns Statutes 1914, Sections 926 to 946, seem to contemplate, Section 928, that only the person or corporation proposing to appropriate can have the writ for the assessment of damages.

Cox v. *R. R. Co.*, 48 Ind. 178.
Oler v. *R. R. Co.*, 184 Ind. 431.

But the "due process" clause prior to the case at bar has been potential in Indiana, for it is held in *Logansport* v. *Uhl*, 99 Ind. 531:

> "The right to compensation where there has been a trespass or an appropriation of lands may be by causing the damages to be assessed under the statute or *by an action for damages.*"

In *Pittsburgh, Fort Wayne & Chicago Ry. Co.* v. *Swinney, Admr.*, 97 Ind. 586, the two following propositions are established:

> 1. "The right of a land owner whose property is being taken for a public purpose is not limited to an assessment of damages under the statute."
> 2. "Condemnation proceedings can not be used as a cover to commit a trespass in the interest of the public."

In this case the Railroad Company began condemnation proceedings July 21, 1871, abandoned then held onto the land and said, "Where are you at?" It wore old Swinney out, 59 Ind. 100 and 91 Ind. 899, but his administratrix finally established the law in Indiana as above stated.

Again we quote *City of Fort Wayne* v. *Fort Wayne & Jackson Railroad Co.*, 149 Ind. 25, decided in 1897.

The land owner may enjoin where the City is proceeding contrary to the constitutional provisions, either State or Nation, even though the statute, Section 3636, R. S. 1894, Burns, provides he cannot have an injunction in such cases by appropriating land or changing the location of streets.

Finally, the right to enjoin may be lost by silence or acquiescence, but the right to sue for damages remains.

Cox v. *R. R. Co.*, 48 Ind. 178.

Logansport v. *Uhl*, 99 Ind. 531.

Benard v. *Sherley*, 135 Ind. 547.

United States v. *North American Co.*, 253 U. S. 330, p. . :

> "When the Government of the United States, without instituting condemnation proceedings, appropriates for a public use under legislative authority, private property to which it asserts title, it implied promises to pay therefor."

Tr., 11 and 19:

> "That by the terms of said contract for the construction of said new bridge, and by the plans and specifications therefor the defendant assumed all damages to private property occasioned by the construction of said work."

So the suit is properly brought against the obligor of this contract.

Thompson on Corporations, 1st Ed., Sec. 6547.

Pollock on Contracts, 200.

A careful examination of the complaint will show the pleader was complying strictly with the provisions of the Indiana code in pleading the facts—several causes of action, certainly two in the second amended paragraph, one under the due process clause and the other under the contract clause of the Federal Constitution.

Section 343 of Burns Revision 1914 provides for what the complaint shall contain:

* * * * *

> *Second:* A statement of the facts constituting the cause of action, in plain, concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.

* * * * *

Fourth: "A demand for the relief to which the plaintiff may suppose himself entitled."

So the theory of the plaintiff need not be definite and certain. Whether in contract or tort the complaint may be good.

Balue v. *Taylor*, 136 Ind. 368.

Citizens Street Ry. Co. v. *Willowby*, 134 Ind. 613.

In the last case it is said:

"It is somewhat difficult to determine the theory upon which this complaint proceeds, but whether it is to be regarded as proceeding upon the theory that the appellant was guilty of a violation of its contract duty as a common carrier of passengers, or upon the theory that one of its servants, acting within the scope of his employment, was guilty of inflicting a willful and wanton injury upon the appellee, it is certainly sufficient to bar another action against the appellant on account of the wrongs set forth."

This is the New York rule, from whence the Indiana Code came.

Wright v. *Hooker*, 10 N. Y. 59.

Connaughty v. *Nichols*, 42 N. Y. 83.

Lockwood v. *Quackenbush*, 83 N. Y. 607.

In the *Connaughty case, supra*, the complaint was for conversion, but the facts were fully stated, so disregarding the words, "*and have converted the same to their own use to the damage of the* said plaintiff." the complaint was held to be one on a contract or in assumpsit and, the action of the Supreme Court of New York at general term in reversing the court at Special term, and upholding a judgment for the plaintiff was sustained.

After adverting to the practice by motion to make more definite to strike out or to separate into as many different

paragraphs as there were causes of action stated, which is the Indiana practice, the New York court rested its conclusion on the following language from *Wright* v. *Hooker, supra*:

> "The very object of the new system of pleading was to enable the court *to give judgment according to the facts stated and proved*, without reference *to the form used or to the legal conclusion adopted by the pleader.*"

ARGUMENT.

In the face of the principles announced in the case of *Pumpelly* v. *Green Bay Company*, 13 Wallace 166, and which the record shows Judge Nichols pressed home on his brethren and the wealth of sound avowals of the Indiana Supreme Court, beginning in 1857 and coming down to very recent days to the fundamentals of our society and government, and to the principles of the 14th Amendment, it is marvelous, not to say, alarming, as Judge Nichols pointed out to his brethren that we should have such a conclusion as Superior Court of Tippecanoe County the Appellate and Supreme Courts of Indiana reach in construing the word "taken" in Section 21 of the Indiana Bill of Rights, viz.:

> "No man's property shall be taken by law, without just compensation."

Keeping in mind that the 14th Amendment is now part of this provision with the utmost respect and consideration we suggest, that a new rule of constitutional and statutory construction must be resorted to account for the extraordinary conclusions in this case.

Many good men believe that the 18th Amendment repealed all other constitutional provisions designed to protect the individual in his natural and inherent and inalienable rights, one of which is the right to acquire, hold and enjoy his property.

The mistake of the draftsman was that of the lawyer who makes a contract ambiguous because of its brevity, and then advises its client to claim it includes the Koran, if desired. Instead of making that compliance most de-

sirable in government, it has introduced resistance. And this is about all the 18th Amendment does saith the man on the other side.

The very object of the 14th amendment was to secure to the individual man his private property. But even this amendment does not repeal the 11th, that a state cannot be sued. At least the fiction is preserved that a state cannot be sued, although every individual in official position can be sued if he or his associates are acting contrary to the due process clause of this 14th amendment in attempting to wrest under guise of law a citizen's property from him.

If the state itself cannot be sued its magistrates or officers of lower degree as Justice Hunt says in his dissenting opinion in *United States* v. *Reese*, 92 U. S. 215, at 251, may be sued.

But here the statute under which boards of county commissioners are organized in Indiana provides for suits against them.

Such bodies are not states in the sense the 11th amendment speaks of states.

But the Debbs case seems to hold that even a state may be enjoined from seceding. *In re Debs*, 158 U. S. 564-597.

Alcohol in large doses, the medical profession had demonstrated was injurious to the human system. Therefore, under the general welfare clause the manufacture and traffic of this commodity can be and should be restricted. But because of the injury wrought under a former sanction of law, is no reason for the government to deprive an individual of his property that he is prohibited hereafter from using, and we do not understand that this court in The National Prohibition cases, 253 U. S. 350, has decided that, even the holder of whisky who is deprived of the right to sell it, cannot in

somewise claim compensation. The reservations in the opinions in these cases would indicate that this question is open at least to those of us who were not engaged in the liquor traffic prior to the 18th Amendment. And had that "small house that stood in the way of progress in the Red Warf" been a dramshop the demurrer would have so stated.

That highest morality which the decisions of this court we quote in point XII *ante*, and the contract clause itself at least enjoin that the government should not do evil that evil should come of it. The public good can never be substantially advanced by ignoring the private rights of property.

We have been in the uplift, we have resisted the naming of the chief of police by the head of the brewers trust, but the evil of the unrestrained use of the police power even in the hands of some of our uplift brethren is no greater than its exercise by a state without limitations.

We will concede that the people in the manner provided may write or add almost any form of an amendment to the Constitution of the United States, but in so doing we do not concede that they thereby repeal the contract clause, the due process clause of the 5th Amendment or of the 14th Amendment.

As we read it the decision of this court in *United States* v. *N. American Co.*, 253 U. S. 330, is a supplement or corrollary to the decision of the court in 253 U. S. 350, National Prohibition Cases, viz., that private property cannot in any form or shape be taken for the public good, without compensation, and as we write this, we read in the public prints of a case from Maine, and by the time the oral argument is reached, we will have the citation of that case by this court, that the government of the United States itself, cannot deny that it is appropriating

private property for public use, even in time of war by shooting cannon balls across it, although the cannon balls do not touch the premises.

The argument that in time of war the government may take the citizen's life or his property is true, but if it cannot succeed without leaving him something in time of peace in the shape of use of or income from that property it must be conceded that our system of society or constitutional government is at an end. The analogy to the case of *United States* v. *N. American Co.*, 253 U. S. 330, is found in a citation from the Indiana authorities in the 11th point of the brief, especially in the case of *Penn. Co.* v. *Swinney, Admnx.*, 97 Ind. 586. The taking of private property by any authorized government agency raises a promise to pay.

So far as we were able to learn only one member of the Indiana judiciary who passed on this case took the ground that the plaintiffs had misconceived their remedy. Judge Dansman states what is a fact that under the Indiana Constitution and statutes, boards of county commissioners are judicial officers, but they are also executives and legislative officers, and the cases cited would indicate that they cannot be judges in their own case, or at least a party injured by them is not required to submit his claims for compensation in any way or shape even in Indiana to the judicial body that takes his property without compensation. He may do that, but he is not required to.

But, however this may be, it would be strange indeed, for the party to present his claims for damages to the board of county commissioners who had proceeded so ruthlessly, as the record in this case shows the defendants proceeded against the plaintiff in error, when he was permitted under the decisions of the Supreme Court of the state to file his suit for damages, whether in con-

tract or in tort in a court of competent jurisdiction against a state entity possessed of property worth many times the amount of damages which had accrued to him.

It is a very serious question as to whether the party whose property is appropriated by any corporation or agency in the State of Indiana can have the benefit of the assessment of damages sought which is set out in point X *ante.*

The underlying idea in the writ of assessment of damages is that the party appropriating the property will not attempt to do so without first giving the party whose property is to be taken, an opportunity in court to object and have his damages ascertained, if any. This is a condition precedent to the right to take the property, which the state itself cannot ignore since the 14th Amendment.

See point 1 at p. 26 and especially the case of *City of Fort Wayne* v. *Fort Wayne and Jackson Railroad Company,* 149 Ind. 25, cited on page 27 *ante.*

While there is no allegation of negligence, as in the construction of the new bridge, the first reason of the "memoranda *ante* p. 10 of the demurrer," states, in either paragraph of the complaint, and while the complaint is "based" on the "constitution and contractual rights of the plaintiffs in error," the facts alleged are broad enough to warrant the inference that the defendant was negligent in the construction of both the old and the new bridge. The embankment, the levees and the plaintiff's buildings stood because it was "built on a rock."

In the 15th ground of demurrer, *ante* 13, the defendant sets up new matter, viz., that it was its duty to widen the new bridge. It vouchsafes no explanation as to why it should narrow the causeway—the street in front of plaintiffs in error's premises, in the face of the increase in population and traffic of all kinds in this growing age

of automobiles, that growth and development that is adverted to in the 6th and 10th reasons of the memoranda.

Before the construction of the new bridge, "Main street" in front of plaintiffs in error's premises was 80 feet wide. Presumably that was the width of the old bridge. It should have been that wide. If it was too narrow and should have been widened according to the showing of the memoranda, it was not widened enough. This court must infer that, in view of the condemnation of 1,864 of 125 feet for the Main street bridge and the extension of Main street, that in 1914, Main street should not be narrowed, reduced below 80 feet in width.

The demurrer admits that the Town of West Lafayette, the seat of Purdue University, with its 2,500 students, took no steps to narrow Main street.

Certainly there are facts from which the court may infer negligence, even malice on the part of the defendant in error, in the construction of both the new and the old bridge, or bad judgment as to the size of the bridge and the possibilities of the floods.

"The construction of the small house on the abutting land could not obstruct the improvement such as the progress of the times might require," says the demurrer in the 10th paragraph or reason, page 12 *ante*. Logically, therefore, they reason the contractor under the guaranty of the defendant in error could enter and undermine the plaintiff's foundations. This in other words is malice pure and simple.

And it is the duty of the court under the reformed system of pleading to indulge in any fair inference that will tend to make the complaint good.

In the petition to transfer the cause from the Appellate to the Supreme Court of Indiana the plaintiffs in error say, not only not in Indiana but not in any court

in the land is there a case where, in a proposed improvement of a street, has the lot owner been denied all access to the street and at the same time denied compensation. Furthermore, the second paragraph of the amended complaint alleges and the demurrer admits that it will be impossible, the way the bridge is built in front of plaintiffs in error's premises, to ever furnish them or admit of their supplying the ingress and egress that will restore anything like the admitted value of their lots and stone building before the trespass.

To say the defendant did not "take" in the face of *E. & C. R. R. Co.* v. *Dech*, 9 Ind. 433, decided in 1857 because the plaintiffs in error are still in possession of the premises is a travesty.

The building of elevated railways in cities like the elevated railways in New York, Chicago and Boston are not analogous to this case. Assume such structures are a burden or an interference, they do not cut the abutting property owner off from the sidewalk. His ingress and egress remains.

The La Salle street tunnel referred to by the defendant in the case of *Transportation Co.* v. *Chicago*, 99 U. S. 635, does not deprive the abutting property owners opposite the entrance to the tunnel, both north and south of the river, of their egress and ingress to and from the street. Perhaps had counsel pursued that situation further they would have found that even in the case of the lot owners north and south of the river, the case was differently disposed of than that of the steamship company, because the cofferdam in the river was only a temporary obstruction, and did not even exclude the boats from the dock, while the tunnel was under construction.

The case of elevating the tracks of a railroad across a street do not apply. In many such cases such changes

in grade are a benefit, but never do they destroy the egress and ingress of the adjacent property holder to and from his premises. So we conclude there is not a case of such injustice in the courts. We therefore submit that the action of the Superior Court of Tippecanoe County in sustaining the demurrer and the action of the Appellate and Superior Courts of Indiana in sustaining the judgment of the Superior Court of Tippecanoe County should be reversed, and that we may have such further proceedings as may be found necessary to do full and complete justice by this court.

OTTO GRESHAM,
Attorney for Plaintiffs in Error.

Office Supreme Court,
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WM. R. STANSB

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1922.

No. 274

WILLIAM RANDALL AND GEORGE S. AKERS,
Plaintiffs in Error,

vs.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA

Brief and Argument of Defendant in Error

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Brief and Argument of Defendant in Error

I

THE RECORD BROUGHT HERE BY WRIT OF ERROR PURPORTING TO COME FROM THE SUPREME COURT OF THE STATE OF INDIANA, PRESENTS NO QUESTION TO THIS COURT FOR THE REASON THAT IT AFFIRMATIVELY APPEARS ON THE FACE OF THE TRANSCRIPT THAT THE SUPREME COURT OF INDIANA DID NOT RENDER ANY FINAL JUDGMENT IN THE CAUSE, BUT THE FINAL JUDGMENT THEREIN WAS RENDERED BY AN INTERMEDIATE COURT, NAMELY: THE APPELLATE COURT OF INDIANA.

I

The Supreme Court of the United States will consider questions brought before it on a writ of error from the state court only, when,

> "A final judgment or decree in any suit in the highest court of the state in which a decision could be had, where is drawn in question the validity of a treaty or statute of the

United States * * * or when is drawn in question the validity of a statute of or authority exercised under any state on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court on a writ of error."

Section 237 of the Judicial Code as amended September 6, 1916.

2

We assert that the above contemplates the following:

(a) There must have been a final judgment or decree of the highest court of the state;

(b) A Federal question must have been drawn in and decided against the plaintiff in error in such final judgment.

Chapin v. *Frye*, 179 U. S. 127.

(c) Writs of error must come from decisions of the *highest* court and not an intermediate court.

(d) A Federal question cannot be raised for the first time after the final judgment from which the writ of error is taken was rendered.

3

Judged by these rules the plaintiffs in error have presented no question before this court because:

(a) The decision sought to be reviewed is a decision of an intermediate court. The Supreme Court did not render any final judgment in the cause as it refused to have the cause certified to it—as we say in Indiana, "The Supreme Court refused to take the case over."

(Transcript, Page 66.)

(b) The Federal question sought to be presented here was raised after the appellate court had rendered its decision and overruled a petition for rehearing. See petition for rehearing filed by the plaintiff in error. (Transcript, Page 54.)

(c) The Federal question sought to be presented was attempted to be raised by the plaintiff in error in their petition to transfer the cause to the Supreme Court of Indiana. As the cause never reached the Supreme Court these questions were never decided. (Transcript, Page 60.)

(d) In the application of the plaintiffs in error for a writ of error to this court they recite:

"That on the 25th day of January, 1922, the Indiana Supreme Court finally denied the prayer of said petition to transfer said cause from the Appellate to the Supreme Court,

and said motion to vacate the order of July 22, and for right and justice in the premises, and ordered that said judgment of the Appellate Court should be affirmed *and that the record in said cause should remain in said Appellate Court, which, thereupon, made the judgment of the Appellate Court the final judgment in said cause. Said record is now in said Appellate Court.*" (Transcript, top Page 70.)

(e) The assignment of errors in this court assign no error against the Supreme Court of Indiana, excepting its failure to take the case over upon petition to transfer, and the overruling of the motion to vacate the order sending said cause to the Appellate Court in the first instance (Transcript, Pages 70-73), so that if a reversal was had it would be to the effect that the Supreme Court of Indiana should order the case sent to it for consideration. this would follow as the order denying the transfer was the only order that they made.

(f) The concluding paragraph of the assignment of errors made by the plaintiffs in error in this court shows conclusively that the plaintiffs in error are demanding a reversal of the final judgment of an intermediate court. The concluding part of the prayer of said assignment is as follows:

"Wherefore the said William Randall and George S. Akers pray that the judgment of the Appellate Court of Indiana be held void and for naught and reversed, and that the judgment of the Superior Court of Tippecanoe County, Indiana, be held void and for naught, and that they be granted right and justice in the cause." (Transcript, Page 73.) Plaintiffs' brief, Page 25.

This court will dismiss a cause at any stage of the proceedings when it appears it has no jurisdiction, regardless of whether a motion to dismiss has been made, or whether defendant in error has made a full appearance.

Mansfield, etc., v. *John Swan et al.*, 111 U. S. 379;
Minnesota v. *Northern Securities Co.*, 194 U. S. 63.

II

WITHOUT WAIVING THE JURISDICTIONAL QUESTION WE ASSERT THAT THIS CAUSE DOES NOT INVOLVE THE CONSTRUCTION TO BE PUT ON THE WORD "TAKEN" BUT INVOLVES THE QUESTION AS TO WHAT IS "PROPERTY" UNDER THE LAWS OF THE STATE OF INDIANA.

I

STATEMENT OF THE FACTS

The statement of the facts as set out in the brief of the plaintiff in error is so disconnected and in some respects erroneous that we deem it advisable to make a connected statement.

The complaint discloses that many years ago there was organized under the laws of the State of Indiana, a corporation known as "The Main Street Bridge Company," organized for the purpose of contructing and owning a bridge across the Wabash River, in Tippecanoe County, Indiana, connecting Lafayette with West Lafayette, which latter town was then known as the Town of Chauncey.

The Bridge Company, pursuant to the statutes then in force, under its power of eminent domain appropriated a strip of ground 125 feet wide across what was known as the bottom lands, for the purpose of furnishing an approach or causeway for such bridge. The damages were, at the time, assessed and paid, and the bridge company went into possession of the real estate, constructed its bridge and approach, which approach reached from the west end of the bridge to the bottom of the hill on which the Town of Chauncey was built. This approach was constructed of earth, being a solid embankment and remained for a good many years. Afterwards, acting within the scope of its authority, the Board of County Commissioners purchased all the property of the Main Street Bridge Company and procured title to said 125 foot strip, together with the bridge then standing, and later on, the commissioners not being in need of the entire strip, sold 22½ feet off the south side to the remote grantors of plaintiffs in error, and conveyed to said remote grantors said strip by deed, which is set out in the complaint.

In 1913, an extraordinary flood destroyed a portion of the Main Street Bridge which then was, for several years had been and now is the main thoroughfare between Lafayette and West Lafayette, and furnishing ingress and egress to the City of Lafayette for the western portion of Tippecanoe county.

By reason of a portion of said bridge being destroyed, said street and highway became impassable, and in order to make said street fit for public travel, the defendant in error, acting within the powers conferred upon it by the legislature, and strictly within

the scope of its authority, entered into a contract for the construction of a new bridge across the Wabash River to take the place of the old one which had been rendered unfit for travel by said flood.

This action upon the part of the Board called for its discretion as to the kind and character of the improvement to be made. Whether to build a new structure of the same height and width and length, and at a cost of more than a half million dollars, which might be again destroyed by the flood water, or whether it should lengthen the bridge so as to afford a wider throat through which the waters of the Wabash River could pass at flood time, and make the same higher so as to raise it far enough above the surface of the water in flood tide so that drift-wood and floating refuse and ice could pass thereunder, without coming in contact with the bridge, and also widen the structure so as to accommodate the immense traffic consisting of trucks, automobiles and vehicles and pedestrians daily using said highway.

It was decided to pursue the latter course, and in consequence thereof the bridge was extended 170 feet further west than the old bridge, was raised eight or nine feet higher than the old one and made much wider.

While the old bridge was yet standing, the plaintiffs in error had constructed within a few feet of the banks of the Wabash River, on this bottom lands, a building, the basement of which was constructed of cement block, high enough to accommodate the first floor of the building to the approach of the old bridge, and the buildings were then within the space of 170 feet included in the extension of the new bridge.

The plaintiffs in error had constructed an approach from their said building to the approach of the bridge, thereby gaining ingress and egress to the street. This solid embankment making the approach of the bridge INCIDENTALLY afforded a protection to the property of plaintiffs in error from the flood water of the Wabash River. When the new bridge was constructed the approach or embankment, under the terms of the contract with the builder, had to come out, thereby taking from the plaintiffs in error their means of ingress and egress to the buildings; also taking from them the INCIDENTAL protection afforded from the flood water. In place of having a solid embankment in front of their property under the new construction, the bridge extended

some eight or nine feet above the surface of the old grade and for some distance west of the plaintiffs' property. In the construction of the work the county did *not go outside* of the real estate which it owned. It is not charged in the complaint that it took *any part* of the property of the plaintiffs in error.

The plaintiffs in error charge that the appellee acted "within the scope of its authority" in the construction of its work; it does not allege that there was any negligence in any of the work that was performed, but the complaint proceeds upon the theory that three separate acts of the appellee constituted A TAKING of its property within the meaning of the constitutional provision, as follows:

FIRST: That by raising the grade of the street in front of their property and placing a bridge in lieu of the solid embankment that ingress and egress to this particular street was cut off and that their ingress and egress constituted a property right inherent in the property, therefore, there was a taking of the appellants' property.

SECOND: That by reason of the embankment constructed as an approach to the bridge having remained at its then present location for a period of more than twenty years incidentally affording protection from the flood waters of the river that plaintiffs in error had a prescriptive right even against the public to have the approach maintained without alteration, and that by reason of such approach being destroyed, it allowed the waters of the river to flow in, over their land at *flood* tide, and deposit sand and gravel on the surface, and that this act constituted *a taking.*

THIRD: The plaintiffs in error contend that inasmuch as the county by its former Board of Commissioners, had conveyed the twenty-two and one-half (22½) foot strip to them that it thereby warranted that the grade of said approach should never be altered or changed, and that by reason of the facts they had a constractual interest in said grade.

It is not alleged in the complaint that the grade of the Main Street approach was within the city limits of any incorporated city and such grade ever established according to law; neither is it alleged that the cause-way affords the only means of access to plaintiffs' in error real estate. The complaint in both paragraphs is set out in the transcript, Pages 6 to 20.

PROPOSITION TO SUSTAIN THE JUDGMENT

For information of this court we herewith set out as required by the rules of the Supreme Court of Indiana, separately numbered propositions which were set out in our brief to the Appellate Court to sustain the judgment of the Tippecanoe Superior Court. These propositions show what matters were passed on by the Appellate Court. They are as follows:

I

"The demurrer to both paragraphs of complaint was properly sustained as the injuries complained of are merely *damnum absque injuria*.

II

The complaint does not allege any *taking* of the appellants' property within the constitutional provision.

III

The interruption or deprivation of ingress or egress to real estate is not a *taking* of the property—this has been frequently decided in this state.

IV

No person can obtain a prescriptive right, as against the public to or in a highway, so as to prevent the duly constituted authorities from making necessary improvements.

V

The raising of the grade of the approach to the bridge or causeway was not subjecting the ground appropriated for a causeway to any new or additional servitude so as to entitle the plaintiffs in error to compensation.

VI

All damages to the property, present and future, were adjudicated and paid at the time the ground was condemned under the power of eminent domain—and the improvement of the causeway used as a street by changing the grade did not entitle the plaintiffs in error to additional damages.

VII

When plaintiffs in error purchased their lots, located as they were on the sands in the bottom, bordering on a river adjacent to the bridge which was part of a busy highway, affording passage to a thriving and populous city, they bought, charged with knowledge that changes might be made in the grade and in the length of the bridge so as to meet the requirements of the public. Plaintiffs in error had, neither could they obtain any vested rights that would prevent any improvement reasonably believed necessary by those charged with keeping the bridge passable.

VIII

The mere fact alleged in the complaint that the approach to the bridge afforded plaintiffs in error protection from the waters of the Wabash River and had furnished their land such protection for more than twenty years and acted as a levee for them, gave them no prescriptive right to have it maintained, without change, or did not estop the county from proceedings to make such changes as should best subserve the interest of the public.

IX

The county had a right to excavate within the borders of a street or causeway the title of which was in the Board of Commissioners, and the consequential damages to the abutters' property would afford no right of action, hence the allegations in the complaint in reference to such excavations add nothing to it.

X

The allegations that the waters of the Wabash River were turned on to plaintiffs' land states only a conclusion for the other allegations show that this was accomplished by simply removing the solid embankment comprising the approach to the old bridge and excavating in its place. There is no allegation that defendant has cut any channel from the river or caused the water to be changed from its natural course.

XI

The allegations that the defendant sold, and by warranty deed conveyed a part of the real estate in question, adds nothing to the complaint, for the Board of Commissioners had no power or authority to make a covenant of warranty, such an attempt on the part of the board was ULTRA VIRES, and

therefore, of no binding force or effect. A Board of Commissioners have only special and limited powers, such only as are conferred by statute. No statute allows the Board to stand back of a title with covenants of warranty.

XII

No act of negligence or misconduct of any kind is charged in the complaint against the Board of Commissioners. Therefore, the action does not sound in tort. The Statute gives no RIGHT OF ACTION. Neither is there any contractural relation, the breach of which is shown. There was no *taking* under the constitution so the plaintiffs are without remedy and the action of the lower court should be upheld.

III

IF THE PLAINTIFFS IN ERROR HAD NO EASEMENT OF ACCESS, LIGHT AND AIR THEY HAD NO PROPERTY WHICH COULD BE TAKEN UNDER THE ALLEGATIONS OF THE COMPLAINT, AS IT IS NOT ALLEGED THAT THERE WAS ANY INVASION OF THE PROPERTY OF THE PLAINTIFFS IN ERROR OUTSIDE OF THEIR ALLEGED INCORPOREAL RIGHTS. THE DEFENDANT IN ERROR DID NOT GO OUTSIDE OF THE PROPERTY WHICH IT OWNED AS A CAUSEWAY IN THE MAKING OF THE BRIDGE, HENCE THERE WAS NO TAKING WITHIN THE CONSTITUTIONAL INHIBITION.

1

The decisions of the highest court of a state that an owner of land abutting upon a city street has no easement of light, air and access as against the public use of the street, or any structure which may be erected thereon to subserve and promote that public use, are conclusive upon the Supreme Court of the United States when determining upon a writ of error to the state court whether such abutting owner has been deprived of his property without due process of law by the erection of a structure in the streets to be used by the general public for the purpose of travel.

Sauer v. *City of New York*, 206 U. S. 536.

2

It is held an abutting owner is not deprived of his property without due process of law by the erection by a municipality in a city street under the authority of the statute which makes no provision for compensation to abutting owners of an iron elevated viaduct for general public use where under the law of the state

as laid down by its highest court abutting owners have no easement of light, air or access as against any improvement of the street for the purposes of adapting it to public travel.

Sauer v. N. Y. City, supra.

3

Contract rights are not unconstitutionally impaired by a decision of the state court which denies compensation to an abutting owner for the erection by a municipality in a street of an elevated viaduct for public use.

Sauer v. *City of New York, supra.*

4

The highest court of the State of Indiana holds that consequential injuries to an abutting property owner arising from the work of a public necessity and convenience performed within the limits of a street is not within the provision of the constitution prohibiting the taking of private property for public use without compensation therefor being first assessed and tendered. An abutting property owner has the right of access from his premises to the street, but he cannot demand that the grade of the street should not be changed or altered because it might interfere with right of access, since such right is private and is held and enjoyed subject to the rights of the state through the municipality, to improve the street or change its grade when public necessity so demands.

Morris v. City of Indianapolis, 177 Ind. 369.

5

In the above case on Page 394 the court says:

"The authorities relied on by appellant's counsel are decisions of courts in cases arising in states whose constitution require compensation be made not only for property taken or appropriated, but also for property injured or damaged. These fundamental provisions are quite different from Section 21 of our bill of rights which prohibits only the taking of property without just compensation.

In fact we have not been able to discover any decision of the higher courts, outside the State of Ohio, which in the absence of some statutory or constitutional provision holds a city liable to an abutting owner for consequential damages on account of the change of a grade in a street, where the work has been done under legal authority in a careful man-

ner; or in other words, without negligence or lack of skill. * * * As a general rule we adhere to and follow our own decisions wherein the rules of the common law are expounded and we are not required to accept and follow the common law as expounded or enforced by the higher courts of sister states."

This seems to settle the question that the courts of the State of Indiana hold that, as against the public an abutting owner has no easement of access to his property.

6

The plaintiffs in error acquired no right as against the public to have the bridge and causeway maintained to the same width and height as originally constructed. The record discloses that the real estate was condemned for its bridge and causeway. The plaintiffs in error have no right to assume that the county would maintain the causeway at the same heighth and the bridge at its same width. The plaintiffs in error could acquire no right by prescription to this public structure *as against the public*, neither did they acquire such right by the warranty deed referred to. In the first instance the Board of Commissioners had no authority to make a warranty deed, and its acts in this respect were ultra vires. In the second instance there was no contract of warranty that the causeway and bridge would not be changed. The warranty, if good, would have been a covenant for peaceful possession, fee-simple title and no incumbrances. That the defendant county could, by a contract of warranty or by failing to assert its right to change the bridge and causeway for a period of twenty years, tie the hands of the defendant county, which is a governmental sub-division, is so unreasonable upon its face that only a statement of the proposition is necessary to show how fallacious it is.

7

The changing of a grade of a street is not a *taking* of the property of the abutter, even though it interfere with, or deprive him of his egress and ingress. The first and perhaps the leading case in the United States is

CALLENDER v. *MARCH*, 1 Pick. 430 (18 Mass. 417). See also

Johnson v. *City of Parkersburg* (W. Va.), 37 Am. Rep. 779;

Morris v. City of Indianapolis, 177 Ind. 369;

12

Sauer v. City of New York, 206 U. S. 536 (51 L. Ed. 1176);
City of Kokomo v. *Mahan,* 100 Ind. 246;
City of Lafayette v. *Nagle,* 113 Ind. 426;
Smith v. *Alexander,* 36 Am. Rep. 788;
2 *Dillon on Mun. Corp.* 782.

8

The state courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel, and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement equivalent to a change of grade; and, that, as in the case of a change of grade, an owner of land abutting on the street, is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it.

Sauer v. *City of New York,* 206 U. S. 536 (and cases cited).
Cited with approval in
Morris v. City of Indianapolis, 177 Ind. 369:384.

9

It is also well settled by our own decisions, that consequential injury does not come within the provision of the state constitution which prohibits the *taking* of private property for public use without compensation therefor, being first assessed and tendered.

Morris v. City of Indianapolis, supra, and cases cited at Page 386.

10

It has been held that the construction of a viaduct the full width of the street as and for an approach to a bridge, is, but in effect, a mere change in the grade of the street, and is not a new or additional servitude for which the abutting owner is entitled to compensation.

Willis v. *City of Winona* (Minn.), 26 L. R. A. 142;
Home Building & Bon. Co. v. *Roanoke,* 27 L. R. A. 551;
Colsbaugh v. *City of Milwaukee,* 65 N. W. 1039;
Elliott on Roads and Streets, 702.

11

The courts make a clear distinction between a *"taking"* of property, and "injury or damage" to it, and in order to give a

right of action for the "injury" to property some states, notably Illinois and Virginia, have amended their constitutions so as to read "No person's property shall be taken or injured * * * etc."

Johnson v. City of Parkersburg, 37 Am. Rep. 779.

12

In the case of Morris v. City of Indianapolis, supra, the court said:

> "In the case at bar it does not appear that by the work in question there has been any invasion of appellants' property, or any appropriation thereof under the authority of eminent domain. Kentucky Avenue, the particular street on which appellants' property abuts, has not been changed, neither had it been subjected to any new or additional servitude, but continues to be used for public travel to the full extent thereof. Under such circumstances the rule appears to be well settled, that, in the absence of constitutional or statutory provision requiring compensation for property injured, as distinguished from property taken, no damages can be recovered by the abutting property owner for consequential injuries or damages resulting from elevating or depressing a street, done in carrying it over or under the railroad tracks or other obstructions, where such work and change are legally authorized in the interest of public safety and convenience. The following authorities support this rule: Home Bld. Co. v. Roanoke, 20 S. E. 895; 27 L. R. A. 551; Robinson v. Gt. N. Co., 51 N. W. 384; Henderson v. Minneapolis, 20 N. W. 332; Hyde v. Boston, 80 N. E. 517; Hurt v. Atlanta, 28 S. E. 65; Selden v. Jacksonville, 14 L. R. A. 370, 29 Am. St. 278; Willetts v. Board, 62 N. J. L. 95, 40 A. T. L. 782; Wilson v. N. Y. R. Co., 2 N. Y. Sup. 65; Uline v. N. Y. R. Co., 101 N. Y. 98; 4 N. E. 536, 54 Am. Rep. 661; Conklin v. N. Y. R. Co., 102 N. Y. 107-110-111; 6 N. E. 663; Rauenstein v. N. Y. supra; Talbot v. N. Y. supra; Fries v. N. Y. R. Co. supra; Smith v. Boston Ry. Co., 181 N. Y. 132, 73 N. E. 679; DeLuca v. City of North Little Rock, 142 Fed. 597. The following support the same rule: Sauer v. N. Y. supra; N. T. Co. v. City of Chicago supra; Wills v. City of Winona, 60 N. W. 814, 26 L. R. A. 142; Colclough v. Milwaukee, 92 Wis. 182, 65 N. W. 1039; Walish v. City of Milwaukee, 95 Wis. 16, 69 N. W. 818; Brand v. Multnomah County, 38 Or. 79, 60 Pac. 390, 62 Pac. 209, 50 L. R. A. 389, 84 Am. St. 772; Warner v. State, 117 N. Y. Sup. 108, 132 App. Div. 611; Scranton v. Wheeler, 179 U. S. 141, 154; 21 Sup. Ct. 48, 45 L. Ed. 126.

14

"The authorities above cited clearly settle the proposition that appellants have no right to recover against the city of Indianapolis the consequential damages which they claim to have sustained on account of the change or alteration of the grade of Kentucky Avenue, in the absence of some constitutional or statutory provision awarding to them such right.
* * *

"This rule, as sustained by the aforesaid authorities, is clearly declared in Rauenstein v. New York, etc. R. Co., supra, where it is held that a change of street grade invades no private right, and whatever the inconvenience to the abutting owner may be, it deprives him of no property right for which he had not been compensated previously. It is further affirmed in that case, that where a street or highway becomes such by dedication, compensation for the easement is expressly waived by the dedicator. If taken under the law of eminent domain, the compensation awarded and paid covers all the damages sustained, present and future, among which there is necessarily embraced such as might flow from a change of grade of a street required for the public use or convenience.
* * *"

13

When property is taken under the law of eminent domain, the compensation awarded and paid covers all the damages sustained, present and future, among which there is necessarily embraced such as might flow from a change of grade of a street required for the public convenience.

Morrison v. *City, supra,* Sec. 4384, R. S. 1914.

ARGUMENT

The court below of original jurisdiction sustained the demurrers to the complaint because the injuries complained of came under the well known rule of DAMNUM ABSQUE INJURIA. The questions raised by the demurrer to the complaint would seem to be well settled by recent decisions of our Supreme Court, notably, Morris v. City of Indianapolis, 177 Ind. 369, and Sauer v. City of N. Y., 206 U. S. 536.

The Morris case was one involving the changing of the grade of Kentucky Avenue to avoid certain grade crossings in the city of Indianapolis, and the question of recovering damages for consequential injuries to abutting owners on the theory that the changing of the grade in cutting off ingress and egress constituted a taking of the property of the abutting owners without compensation.

Judge Jordon in an exhaustive opinion holds that such action *does not constitute a taking.* In the Morris case, as in this case, there is no claim that there was any violation of any statute. Neither is it claimed there was any negligence in the construction of the work or any wrong act upon the part of the Board.

It is alleged in the complaint that the defendant in error proceeded strictly within the scope of its authority and at all times acted upon the authority conferred by it.

Judge Jordon, on Page 382 of the case above cited, says:

> "There is no claim that there was any negligence or lack of skill by the city in the performance of the work of which they complain. As we view the question, we are of the opinion that the necessary alteration, change or elevation of the grades of streets and the depression and elevation of steel railroad tracks, where they cross public streets or highways within said city as authorized by the statute and required to be done under the resolution of the board of public works, must be regarded as a matter wholly of street improvement." And again, on page 384 of the decision it is said:
>
> "The Supreme Court of the United States in Sauer v. City of New York (1907), 206 U. S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176, said: 'The state courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement equivalent to a change of grade; and that, as in the case of change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of

access to his land and the lessening of the circulation of light and air over it.'" Citing many authorities.

It has been decided on numerous occasions by the Supreme Court of Indiana, and the rule is well settled, that "where work of public necessity and convenience has been performed within the limits of a public street of a city or town, through properly constituted officials under statutory authority and without negligence or lack of skill, no legal liability arises against the city or town in favor of the abutting property owner for consequential injury or damage sustained by him, and that this rule applies in full force in denying the right of action to a property owner for injuries or damages resulting on account of the alteration or change of grade of a street on which property abuts."

Morris v. *City of Indpls.* supra, and authorities cited.
Sauer v. *City of New York*, 206 U. S. 536;
Bedford v. *U. S.*, 192 U. S. 217.

Since the Supreme Court of the United States has decided that the question as to whether or not an abutting owner of property upon a public thoroughfare has an easement of access, or has a property right in the maintenance of the street and its structures, is solely for the state courts, and the state courts in the case at bar as well as in many other cases here cited, have held that no such property right exists, therefore, there could not be a "taking" of any property of the plaintiffs in error.

Some allegations appear in the complaint, and are alleged with some degree of sincerity in the brief of plaintiffs in error, on the question of the county having made a warranty deed to a portion of the land, that they cannot afterwards change the grade of the cause-way as it then existed without constituting a breach of their warranty; that by making such deed, the county impliedly warranted that the grade of the cause-way should remain always as it then was.

We have cited cases in our points and authorities on this question, but if none were cited, we would still hold that such could not be the law. In the first place, Boards of County Commissioners are creatures of the statute, deriving all their powers therefrom. They are, therefore, boards of special and limited jurisdiction, having only such powers as are expressly conferred by statute and such implied powers as may be necessary to carry into execution the express powers conferred. A search of the statutes will disclose no law whereby the boards of county commissioners are authorized to bind the county by warranty deed.

Where they are given power to dispose of real estate; like a commissioner, appointed by the court, convey only the title that the municipality have, be it good, bad, or indifferent, and those dealing with the county are bound to take notice of its limited powers and are not justified in acting upon any representations made beyond such powers.

The allegations, therefore, in the complaint, with reference to the source of title in this respect adds nothing to the value of the complaint.

However, there are other allegations with reference to the source of title which we think are of prime importance in the consideration of the questions here involved; (if the plaintiff in error could overcome the propositions that his damages are merely consequential) it is alleged in the complaint that the plaintiffs' in error remote grantor was the LaFayette Bridge Company and that said Bridge Company, acting under the terms of the statute then in force, brought proceedings to condemn the real estate, the injury to which is now complained of, and in such condemnation proceedings the damages *to this property* as well as to other abutting property was assessed and paid, and it is shown by the allegations of the complaint that the party condemning such real estate was to obtain the same for the purpose of making a causeway across the bottom lands and an approach to the bridge. This being true, no change in the grade of the causeway or approach could be construed as subjecting the abutting lands to a new burden, or adding any additional servitude to them, or as a *taking* of their property, because when the land was once condemned for the purpose of a causeway, those condemning it and their successors had a right to use it for that purpose in such manner as they desired. It could not be implied that they should always maintain a causeway at a certain height or at a certain width. Sec. 4384, Burns 1914.

Tippecanoe County bought the Bridge Company property and with such purchase secured their old bridge and old causeway and all the rights and privileges and immunities that went with it. There was nothing in the transaction that would bind Tippecanoe County to keep the old causeway, made of solid embankment, at the same grade at which it was originally constructed, simply to furnish a means of ingress or egress to abutting property owners, or because it *incidentally* furnishes a levee against the high water of the Wabash River. A causeway or approach is made for the

public generally and not for the benefit of the abutting land owners. While, of course, he may use it, providing it is sufficiently convenient for his use, but he cannot force the county to forego its privilege of keeping its highway passable and fit for public travel in order that he may have certain individual privileges extended to him.

It is folly to assert that an abutting owner acquired any interest in the highway which was inconsistent with the public's use.

It is a well known rule of law that one cannot acquire a prescriptive right in a highway. "The statutes of limitations do not run against the King." And, as the construction and maintenance of highway is done in the exercise of the sovereign power of the state, no one could acquire a right by or through the statutes of limitations.

It would seem, from a reading of the complaint that the plaintiffs in error went down into the river bottoms and bought the land abutting upon the banks of a navigable stream, because the land was cheap, owing to the fact that it was too low for ordinary farm use and too low for building purposes, and of very little market value. When they purchased this real estate, they were bound to take notice that owing to the character of the surface of the ground, and the character of the highway and surrounding circumstances that the municipal officers might be required to raise and widen the bridge and the causeway approaching the same. In fact they were bound to take notice that the municipal officers might be called upon to do exactly what they did do.

It was circumstances such as these that made the land of such little value.

We submit that from a reading of the decisions cited in our points and authorities, and a consideration of the matters shown by the record the plaintiffs in error should be denied any relief in this court.

Respectfully submitted,
CLYDE H. JONES,
Attorney for Defendants in Error.

D. P. FLANAGAN,
of Counsel.

RANDALL ET AL. *v.* BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 274. Argued January 25, 1923.—Decided February 19, 1923.

A writ of error to the highest court of a State must be dismissed when the judgment is one of an intermediate court which the highest court has declined to review for want of jurisdiction. Writ of error to review 131 N. E. 776, dismissed.

Mr. Otto Gresham for plaintiffs in error.

Mr. Clyde H. Jones, with whom *Mr. D. P. Flanagan* was on the brief, for defendant in error.

Memorandum opinion by MR. JUSTICE SUTHERLAND.

This is a writ of error to the Supreme Court of Indiana, when, clearly, it should have been to the State Appellate Court.

The action was brought in the Superior Court for Tippecanoe County. A demurrer to the complaint was sustained. An appeal was allowed to the Supreme Court but that court, of its own motion, entered an order transferring the cause to the Appellate Court, for want of jurisdiction. The Appellate Court thereupon took the case, received the briefs of counsel, heard oral arguments and affirmed the judgment of the trial court. A petition for rehearing was submitted and denied. Plaintiffs in error then applied to the Supreme Court for an order to vacate its former order of transfer, or, in the alternative, for a writ of error *coram nobis,* which the Supreme Court denied.

It therefore appears that the Supreme Court refused to take the case on appeal for want of jurisdiction, and the judgment of the highest court of the State in which a deci-

sion in the suit could be had, Judicial Code, § 237, is that of the Appellate Court to which the writ should have been directed.

The writ of error must, therefore, be dismissed on the authority of *Western Union Telegraph Co.* v. *Hughes,* 203 U. S. 505; *Lane* v. *Wallace,* 131 U. S. Appendix CCXIX; *Norfolk & Suburban Turnpike Co.* v. *Virginia,* 225 U. S. 264, 269; *Second National Bank* v. *First National Bank,* 242 U. S. 600; *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530.

Dismissed.